TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 864

THE UNITED STATES, APPELLANT

vs.

THE PITTSBURGH & WEST VIRGINIA RAILWAY COMPANY AND THE WEST SIDE BELT RAILROAD COMPANY

No. 865

THE PITTSBURGH & WEST VIRGINIA RAILWAY COMPANY AND THE WEST SIDE BELT RAILROAD COMPANY, APPELLANTS

vs.

THE UNITED STATES

APPEALS FROM THE COURT OF CLAIMS

FILED JANUARY 4, 1926

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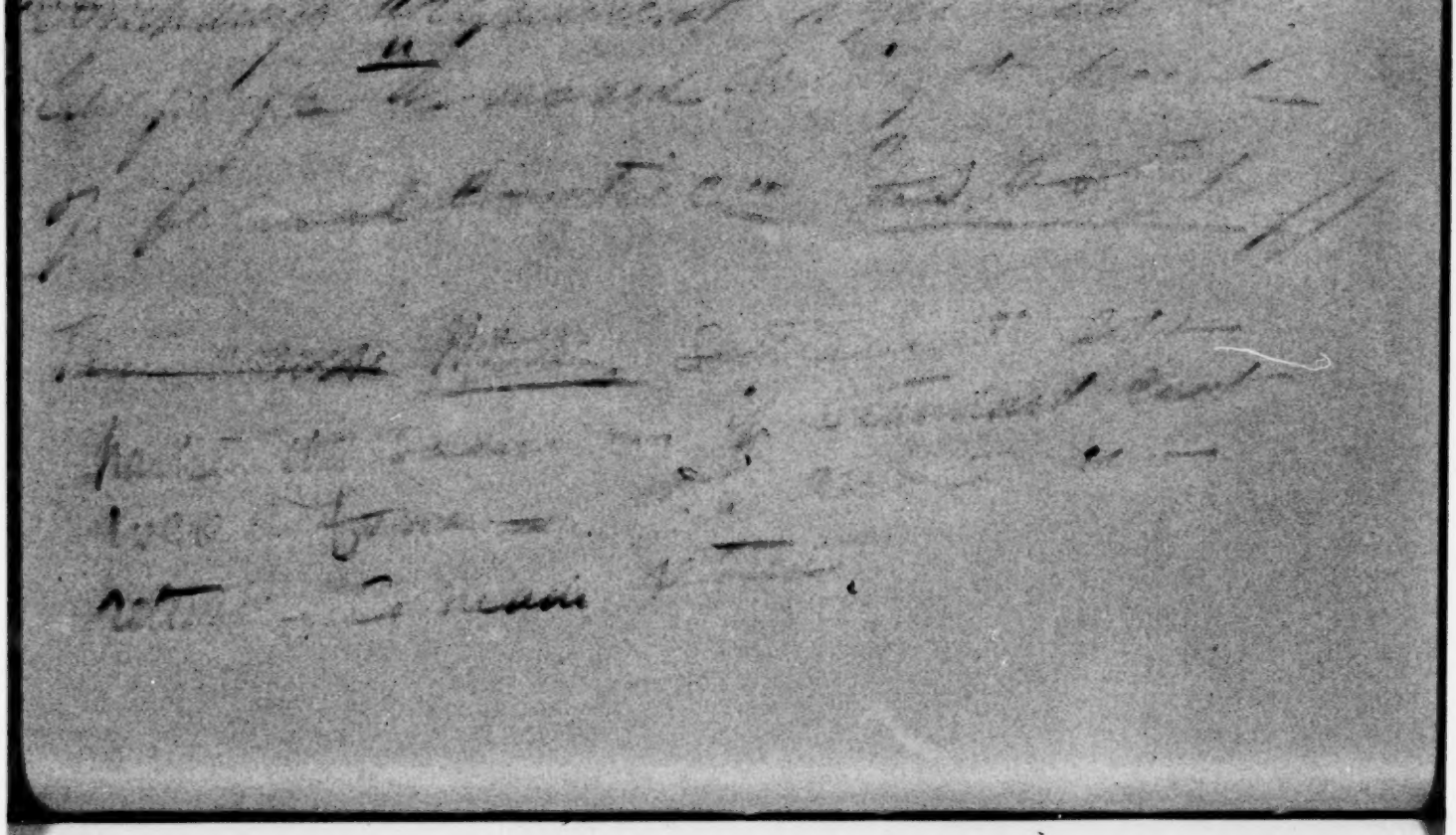

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1 In Court of Claims of the United States

No. C–32

THE PITTSBURGH & WEST VIRGINIA RAILWAY COMPANY, A CORPORATION; the West Side Belt Railroad Company, a Corporation,

vs.

THE UNITED STATES

I. *Minute entries*

On February 12, 1923, the plaintiff filed its original petition in the name of the Pittsburgh & West Virginia Railway Company, a corporation.

Subsequently, to wit, on May 2, 1923, by leave of court, the plaintiff filed its amended petition.

Subsequently, to wit, on February 6, 1925, by leave of court, the plaintiff filed a second amended petition in the name of the Pittsburgh & West Virginia Railway Company, a corporation; the West Side Railroad Company, a corporation.

Said second amended petition is as follows:

II. *Second amended petition*

Filed Feb. 6, 1925

To the honorable Chief Justice and Associate Justices of the Court of Claims:

The plaintiff, the Pittsburgh and West Virginia Railway Company, by leave of court first had and obtained, respectfully represents:

First count

2 1. It is, and, at all times hereinafter mentioned, was a corporation duly organized and existing under the laws of the States of Pennsylvania and West Virginia, and having its principal business office in the city of Pittsburgh, State of Pennsylvania, and engaged in the business of a common carrier by railroad. The Pittsburgh and West Virginia Railway Company owns all of the stock of the West Side Belt Railroad Company, a corporation duly organized and existing under the laws of the Commonwealth of Pennsylvania and engaged in the business of a common carrier by railroad. For the purposes of taxation the Pittsburgh and West Virginia Railway Company and the West Side

Belt Railroad Company were required at the times hereinafter mentioned by the Commissioner of Internal Revenue, pursuant to his authority under the revenue acts, to render a consolidated tax return and to pay taxes based thereon.

2. From January 1, 1918, to February 29, 1920, inclusive, the plaintiff and its subsidiary, West Side Belt Railroad Company, were operated and controlled by the United States under the Federal control act of March 21, 1918, and the proclamation of the President of December 26, 1917. The plaintiff had on, to wit, April 1, 1917, undergone a reorganization and was a carrier whose earnings for the three years preceding June 30, 1917, were not fully reflected in the operating railway income for the said three years and could not accurately be determined therefrom, and under section three of the Federal control act it was forced to negotiate with the United States in order to establish the amount of just compensation payable to it for operations under Federal control.

3 3. During the years 1918 and 1919 negotiations were had between plaintiff and the United States to determine the amount of just compensation to which plaintiff and its subsidiary, the West Side Belt Railroad Company, were entitled. In January, 1920, plaintiff was paid the sum of $250,000 on account by the United States as part of the just compensation for operation under Federal control. In 1920 and 1921 further negotiations were continued between plaintiff and defendant, and during the year 1921 the United States and the plaintiff agreed that the just compensation for plaintiff and its subsidiary for the whole period of Federal control should be $1,820,000. (The final settlement agreements between the Director General of Railroads and the Pittsburgh and West Virginia Railway Company and the West Side Belt Railroad Company are attached hereto marked "Exhibits A and B," and prayed to be made a part of this petition. Said settlement agreements, as will be seen by reference thereto, provide for payment to the Pittsburgh and West Virginia Railway Company of the sum of $720,000 and to West Side Belt Railroad Company of $1,080,000, a total to the two of $1,800,000, which amount was comprised of $1,570,000 balance of compensation and $230,000 in adjustment of other claims not concerned herein.) In accordance with these agreements the United States paid the plaintiff and its subsidiary the sum of $1,570,000 as and for compensation for the use of their properties in addition to the sum of $250,000 paid on account in 1920.

4 Under the Federal control act and internal revenue acts of 1916, 1917, and 1918, all railroads operating under Federal control were required to return and pay out of their own funds and bear all Federal corporation taxes save and except the original normal corporation tax of two per cent. The said normal tax of two per cent was to be paid and borne, under the said laws by the United States, as a part of the operating expenses of

each carrier. It was the custom, however, for each carrier to return and pay the said two per cent normal tax, together with the taxes payable and bearable out of its own funds, upon the receipt of its just compensation, whereupon the United States, through the Director General of Railroads, duly credited the carrier to the extent of the said two per cent normal tax so paid. Plaintiff so returned and paid the two per cent normal tax upon the $250,000 paid on account by defendant in January, 1920, and was duly credited by the Director General of Railroads to the extent of the said two per cent tax so paid. The Federal corporation tax upon the net income of railroads, accrued or received in the year 1918, including the normal tax of two per cent, was twelve per cent, and the Federal corporation tax upon the net income of railroads, accrued or received in the year 1919 or succeeding years, was ten per cent.

5. When plaintiff and its subsidiary received $1,570,000 of the just compensation allowed and paid for operations under Federal control, to wit, in the year 1921, the companies were no longer under Federal control, and there was no way in which the normal two per cent corporation tax, if returned and paid by plaintiff, could be credited to it by the Director General of Railroads. Because of certain deductions allowed by law, the taxable net income of plaintiff and its subsidiary for the year 1921 was $1,064,781.39. Before paying the tax thereon, plaintiff in, to wit, March, 1922, made formal and timely application to the Commissioner of Internal Revenue for a ruling as to the rate of tax to be paid by it upon the said $1,064,781.39, being the balance of the $1,570,000 received in the year 1921 as just compensation for operations under Federal control that was taxable. Plaintiff maintained that it should be credited to the extent of the normal two per cent tax payable by the United States, and should make a return and pay a tax at the rate of eight per cent only upon the net income so received in 1921. The Commissioner of Internal Revenue ruled that the tax of ten per cent should be returned and paid by plaintiff, and plaintiff, under protest, has returned and paid the tax of ten per cent upon the moneys received as just compensation for operations under Federal control, the said tax amounting to $106,478.14. Plaintiff duly filed with the Commissioner of Internal Revenue a claim for the refund of such portion of the tax unlawfully collected, viz., the normal tax of two per cent, which claim for refund was denied by the Commissioner of Internal Revenue on October 6, 1922.

6. Plaintiff is entitled to receive and now claims from the United States the sum of $21,295.62, being two per cent of $1,064,781.39, the difference between the eight per cent tax on the moneys received as just compensation for operations under Federal control and the ten per cent tax on said sum actually paid under protest. No part of the said sum so paid has been returned to plaintiff by the United States, and plaintiff is justly entitled to receive and recover from the United States for and on account of this claim the sum of

$21,295.62, together with interest at the rate of ½ of 1 per cent per month from the date of payment of the tax to the date of
6 payment of such money judgment as the court might enter, after allowing all just credits and set-offs.

7. This claim is made under and depends upon the following acts of Congress, to wit: The Federal control act of March 21, 1918 (40 Stat. L. 451); the transportation act of 1920 (41 Stat. L. 456); and the internal revenue acts of September 8, 1916 (39 Stat. L. 756); and October 3, 1917 (40 Stat. L. 300), and of February 24, 1919 (40 Stat. L. 1057).

Second count

And further showing to your honors, plaintiff respectfully represents:

1. That on, to wit, July 1, 1921, the plaintiff and its subsidiary entered into contracts with the United States acting through the Director General of Railroads, copies of which contracts are hereto annexed, marked "Exhibits A and B," and made a part hereof. In said contracts the United States agreed to save plaintiff and its subsidiary harmless from all taxes, except what were known as war taxes, assessed under Federal or any other Governmental authority for any part of the period of Federal control on the property under such control, or on the revenue derived from operation of the same. The United States further agreed to pay or save the plaintiff harmless from the expense of all suits respecting the classes of taxes payable under the agreements.

2. Subsequent to the ruling of the Commissioner of Internal Revenue referred to in the first count of this petition, plaintiff called upon the United States through the Director General of Rail-
7 roads to reimburse it for the payment of the two per cent tax on the revenues derived from operations during Federal control amounting to the sum of $21,295.62, but the United States has refused and refuses to so reimburse plaintiff or to save it harmless from the payment of said two per cent tax, all of plaintiff's damage in the sum of $21,296.62, plus such reasonable sum as the court might in its discretion fix for counsel fees and other expenses in connection with this suit.

3. No action has been taken by Congress with regard to this claim, or by any of the departments other than the Treasury Department and the Director General of Railroads as aforesaid. The plaintiff is the only person owning or interested in the claim above set forth, and no assignment or transfer of the same or any part thereof or interest therein has been made. The plaintiff is justly entitled to receive and recover for and on account of this claim the sum of $21,295.62 and interest as aforesaid, plus such reasonable sum as the court might in its discretion fix for counsel fees and other expenses in connection with this suit; and for the aggregate of these sums

plaintiff prays judgment, as well as for such other relief as this honorable court might grant both at law and in equity in the premises.

THE PITTSBURGH & WEST VIRGINIA RAILWAY COMPANY,
THE WEST SIDE BELT RAILWAY COMPANY,
By HARVEY D. JACOB,
Attorney for Plaintiff.

FRANK M. SWACKER,
Of Counsel.

[*Duly sworn to by Harvey D. Jacob; jurat omitted in printing.*]

9 *Exhibit A to second amended petition*

FINAL SETTLEMENT BETWEEN THE DIRECTOR GENERAL OF RAILROADS AND THE PITTSBURGH AND WEST VIRGINIA RAILWAY COMPANY, JULY 1, 1921

This agreement, entered into this 1st day of July, A. D. 1921, by and between James C. Davis, Director General of Railroads and agent of the President, acting on behalf of the United States and the President, hereinafter called the "director general," and the Pittsburgh and West Virginia Railway Company, hereinafter called the "company."

Witnesseth:

The Pittsburgh and West Virginia Railway Company hereby acknowledges payment of the sum of seven hundred and twenty thousand ($720,000.00) by the said director general, the receipt whereof is hereby acknowledged, in full satisfaction and discharge of all claims, rights, and demands, of every kind and character, which the said company now has or hereafter may have or claim against the director general, or any one representing or claiming to represent the director general, the United States, or the President, growing out of or connected with the possession, use, and operation of the company's property by the United States during the period of Federal control; and the said company hereby acknowledges the return to and receipt by it of all its property and rights which it is entitled to, and further acknowledges that the di-
10 rector general has fully and completely complied with and satisfied all obligations on his part, or on the part of the United States, or the United States Railroad Administration, growing out of Federal control.

The purpose and effect of this instrument is to evidence a complete and final settlement of all demands, of every kind and character, as between the parties hereto growing out of Federal control of railroads, save and except that the following matters are not included in this adjustment and are not affected thereby:

Exceptions

1. The obligation on the part of the company, as expressed in the standard form of contract between the director general and the railroads, as to the conduct of litigation arising out of Federal control (except as to claims and suits of carriers against the director general or the United States), as same is stated in paragraph (f) of section 9 of said contract, or as heretofore agreed to by the company, is to continue, and is not affected by this settlement.

2. This settlement does not include or effect any moneys or assets of the director general turned over to the company pursuant to General Order No. 68, the account created by this order to be adjusted as though this agreement had not been made.

3. This settlement does not include the obligations of the director general assumed in paragraphs (i) and (j) of section 4 of said standard contract, to save the company harmless as to claims, if any, of third persons, or the obligations of the director gen-
11 eral, in respect to the payment of taxes under section 6 of the contract.

In witness whereof, the parties to this agreement have duly signed, sealed, and executed the same in triplicate, such agreement being duly executed by the president of the company and attested by its assistant secretary, with the corporate seal hereto annexed, and the said president hereby certifies that he has been duly authorized to execute and deliver this agreement on the part of the company by a vote of its board of directors, at a lawful meeting of said directors held on the 30th day of June, A. D. 1921.

[SEAL.] JAMES C. DAVIS,
Director General of Railroads
and Agent of the President.

[SEAL.] THE PITTSBURGH AND WEST
VIRGINIA RAILROAD COMPANY,
By H. E. FARRELL, *President.*

Attest:
JOHN J. O'BRIEN,
Assistant Secretary.

(NOTE.—The provisions of the standard form of contract referred to in "exceptions" to Exhibit A are as follows):

SECTION 9 (f). After Federal control no claim by or against the director general shall be settled by the company against the written objection of the director general or the Attorney General of the United States. The conduct of all litigation before any court or commission arising out of such disputed claims or out of
12 operations during Federal control shall be in charge of the company's legal force and the expense thereof shall be paid by the company; but the director general or the Attorney General

may, at the expense of the United States, employ special counsel in connection with any such litigation.

SECTION 4 (i). The director general shall pay, or save the company harmless from, all expenses incident to or growing out of the possession, operation, and use of the property taken over during Federal control, except the expenses which under this agreement are to be borne by the company. He shall also pay or save the company harmless from all rents called in the monthly reports to the commission equipment rents or joint-facility rents, and all judgments or decrees that may be recovered or issued against, and all fines and penalties that may be imposed upon, the company by reason of any cause of action arising out of Federal control, or of anything done or omitted in the possession, operation, use, or control of the company's property during Federal control, except judgments or decrees founded on obligations of the company to the director general of the United States.

SECTION 4 (j). Except as otherwise provided in this agreement, the director general shall save the company harmless from any and all liability, loss, or expense resulting from or incident to any claim made against the company growing out of anything done or omitted during Federal control in connection wtih, or incident to, operation or existing contracts relating to operation, and shall do and perform, so far as is requisite under Federal control for the pro-
13 tection of the company, all and singular the things, of which he may have notice, necessary and appropriate to prevent, because of Federal control or of anything done or omitted thereunder, the forfeiture or loss by the company of any of its property rights, ordinance rights, or franchises, or of its trackage, lease, terminal, or other contracts involving a facility of operation; but nothing herein contained shall be construed to require the director general to make any capital expenditure necessary to preserve a franchise or ordinance right not heretofore availed of by the company. The director general shall also save the company harmless from any and all claims for breach of covenant heretofore entered into by the company or by any predecessor in title or interest in any mortgage or other instrument in respect to insurance against losses by fire.

Nothing in this or in the preceding paragraph shall be construed to be an assumption by the director general of, or to make him liable on, any obligation of the company to pay a debt secured by a mortgage or any rent under a lease, except rents which during the test period were called in the monthly reports to the commission equipment rents and joint facility rents and rents which under the accounting rules of the commission in force during the test period were classified as operating expenses, or to make the director general liable to the company in respect of any interest on any bonds issued by, or in respect of any obligations of, other corporations, or in respect of contributions to make up deficits in the earnings of

other corporations, except as payments in respect of such interest or other amounts were classified under said rules as equipment or joint facility rents, or were a class of payments to be otherwise reflected in railway operating income.

14 The company shall, during Federal control, pay the rents of any property held by it under lease or contract, described in paragraph (a) of section 2 hereof, except the rents which during the test period were, under the rules of the commission, classified as equipment rents or joint facility rents, and rents which were classified as operating expenses, which excepted rents shall be paid by the director general. If the lease of, or right to use, any property described in paragraph (a) of said section 2 expires during Federal control, the company shall, if possible, and if requested by the director general, renew the same; the rental, however, of property in the excepted classes above mentioned shall be paid by the director general. The company shall pay the same amount of rent as was payable at the beginning of Federal control for other property, the lease of or right to use which is renewed at the request of the director general, but any increase in the rental of such other property shall be paid by the director general.

SECTION 6 (a) All taxes assessed under Federal or any other governmental authority for the period prior to January 1, 1918, including a proportionate part of any such tax assessed after December 31, 1917, for a period which includes any part of 1917 or preceding years, and unpaid on that date, all taxes commonly called war taxes which have been or may be assessed against the company under the act of Congress entitled "An act to provide revenue to defray war expenses and for other purposes," approved October 3, 1917, or under any act in addition thereto or in amendment thereof, and all taxes which have been or may

15 be assessed on property under construction, and all assessments which have been or may be made for public improvements, chargeable under the accounting rules of the commission in force December 31, 1917, to investment in road and equipment, shall be paid by the company; but upon the amount thus chargeable to investment interest shall be paid to the company during Federal control at the rate provided in paragraph (d) of section 7 hereof. Taxes assessed during construction or additions, betterments, and road extensions made by the company with the approval or by order of the director general during Federal control, shall be considered a part of the cost of such additions, betterments, and extensions and shall, under the provisions of paragraph (d) of section 7 hereof, bear interest as a part of such cost from the date of the completion of such additions, betterments, or extensions. Assessments for public improvements which do not become a part of the property taken over shall bear interest from the date of the payment of such assessment.

(b) If any tax or assessment which under this agreement is to be paid by the company is not paid by it when due, the same may be

paid by the director general and deducted from the next installment of compensation due under section 7 hereof. If any taxes properly chargeable to the director general have been or shall be paid by the company, it shall be duly reimbursed therefor.

(c) The director general shall either pay out of revenues derived from railways operation during the period of Federal control or shall save the company harmless from all taxes lawfully
16 assessed under Federal or any other governmental authority for any part of said period on the property under such control, or on the right to operate as carrier, or on the revenues derived from operation, and all other taxes which under the accounting rules of the commission in force December 31, 1917, are properly chargeable to "railway tax accruals," except the taxes and assessments for which provision is made in paragraph (a) of this section. The director general shall pay or save the company harmless from the expense of all suits respecting the classes of taxes payable by him under this agreement.

(d) If any such tax is for a period which began before January 1, 1918, or continues beyond the period of Federal control, such portion of such tax as may be apportionable to the period of Federal control shall be paid by the director general, and the remainder shall be paid by the company.

(e) Whenever a period for which a tax is assessed can not be definitely determined, so much of such tax as is payable in any calendar year shall be treated as assessed for such year.

17 *Exhibit B to second amended petition*

Final settlement

This agreement, entered into this 1st day of July, A. D. 1921, by and between James C. Davis, Director General of Railroads and agent of the President, acting on behalf of the United States and the President, hereinafter called the "director general," and the West Side Belt Railroad Company, hereinafter called the "company."

Witnesseth:

The West Side Belt Railroad Company hereby acknowledges payment of the sum of one million eighty thousand dollars ($1,080,000) by the said director general, the receipt whereof is hereby acknowledged, in full satisfaction and discharge of all claims, rights, and demands, of every kind and character, which the said company now has or hereafter may have or claim against the director general, or anyone representing or claiming to represent the director general, the United States, or the President, growing out of or connected with the possession, use, and operation of the company's property by the United States during the period of Federal control; and the said company hereby acknowledges the return to and receipt by it of all its property and rights which it is entitled to, and further acknowl-

edges that the director general has fully and completely complied with and satisfied all obligations on his part, or on the part of the United States, or the United States Railroad Administration, growing out of Federal control.

The purpose and effect of this instrument is to evidence a
18 complete and final settlement of all demands, of every kind and character, as between the parties hereto growing out of the Federal control of railroads, save and except that the following matters are not included in this adjustment and are not affected thereby:

Exceptions

1. The obligation on the part of the company, as expressed in the standard form of contract between the director general and the railroads, as to the conduct of litigation arising out of Federal control (except as to claims and suits of carriers against the Director General of the United States), as same is stated in paragraph (f) of section 9 of said contract, or as heretofore agreed to by the company, is to continue, and is not affected by this settlement.

2. This settlement does not include or affect any moneys or assets of the director general turned over to the company pursuant to General Order No. 68, the account created by this order to be adjusted as though this agreement had not been made.

3. This settlement does not include the obligations of the director general assumed in paragraphs (i) and (j) of section 4 of said standard contract, to save the company harmless as to claims, if any, of third persons, or the obligations of the director general in respect to the payment of taxes under section 6 of the contract.

In witness whereof the parties to this agreement have duly signed, sealed, and executed same in triplicate, such agreement being duly executed by the vice president of the company and attested by its assistant secretary, with the corporate seal hereto attached, and
19 the said vice president hereby certifies that he has been duly authorized to execute and deliver this agreement on the part of the company by a vote of its board of directors, at a lawful meeting of said directors held on the 20th day of June, A. D. 1921.

JAMES C. DAVIS,
Director General of Railroads
and Agent of the President.
WEST SIDE BELT RAILROAD COMPANY,
By H. E. FARRELL, *Vice President.*

Attest:
JOHN J. O'BRIEN,
Assistant Secretary.

(NOTE.—The exceptions referred to in Exhibit B are the same provisions of the standard contract referred to in Exhibit A and hereinbefore set out in note to Exhibit A.)

20 III. *General traverse*

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises having been entered on the part of the defendant, a general traverse is entered as provided by Rule 34.

IV. *Argument and submission*

On March 18, 1925, this case was argued and submitted on merits by Mr. Harvey D. Jacob for the plaintiff, and by Mr. A. A. McLaughlin for the defendant.

21 V. *Findings of fact, conclusion of law, and opinion of the Court by Booth, J.*

Entered May 4, 1925

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of fact

I

Plaintiff is and, at all times hereinafter mentioned, was a corporation duly organized and existing under the laws of the States of Pennsylvania and West Virginia, and having its principal business office in the city of Pittsburgh, State of Pennsylvania, and engaged in the business of a common carrier by railroad. The Pittsburgh and West Virginia Railway Company owns all of the stock of the West Side Belt Railroad Company, a corporation duly organized and existing under the laws of the Commonwealth of Pennsylvania and engaged in the business of a common carrier by railroad. For the purposes of taxation the Pittsburgh and West Virginia Railway Company and the West Side Belt Railroad Company were required at times hereinafter mentioned by the Commissioner of Internal Revenue, pursuant to his authority under the revenue acts, to render a consolidated tax return and plaintiff to pay taxes based thereon.

II

From January 1, 1918, to February 29, 1920, inclusive, the plaintiff and its subsidiary, West Side Belt Railroad Company, were operated and controlled by the United States under the Federal control act of March 21, 1918, and the proclamation of the President of December 26, 1917. The plaintiff had, on, to wit, April 1, 1917, undergone a reorganization and was a carrier whose earnings for the three years preceding June 30, 1917, were not fully reflected in the operating railway income for the said three years, and could not

accurately be determined therefrom, and under section one of the Federal control act it did negotiate with the United States in order to establish the amount of just compensation payable to it for operations under Federal control.

III

During the years 1918 and 1919 negotiations were had between plaintiff and the United States to determine the amount of just compensation to which plaintiff and its subsidiary, the West
22 Side Belt Railroad Company, were entitled. In January, 1920, plaintiff was paid the sum of $250,000 on account by the United States as part of the just compensation for operation under Federal control. In 1920 and 1921 further negotiations were continued between plaintiff and defendant, and during the year 1921 the United States and the plaintiff agreed that the just compensation for plaintiff and its subsidiary for the whole period of Federal control should be $1,820,000. (The final settlement agreements between the Director General of Railroads and the Pittsburgh and West Virginia Railway Company and the West Side Belt Railroad Company are attached to the petition as Exhibits A and B, and are made a part hereof by reference. Said settlement agreements provide for payment to the Pittsburgh and West Virginia Railway Company of the sum of $720,000 and to the West Side Belt Railroad Company of $1,080,000, a total to the two of $1,800,000, which amount was comprised of $1,570,000 balance of compensation and $230,000 in adjustment of other claims not concerned herein.) In accordance with these agreements the United States paid the plaintiff and its subsidiary the sum of $1,570,000 as and for compensation for the use of their properties in addition to the sum of $250,000 paid on account in 1920.

IV

Under the Federal control act and internal revenue acts of 1916, 1917, and 1918 all railroads operating under Federal control were required to return and pay out of their own funds and bear all Federal corporation taxes save and except the original normal corporation tax of two per cent. It was the custom for each carrier to return and pay the said two per cent normal tax, together with the taxes payable and bearable out of its own funds, upon the receipt of its just compensation, whereupon the United States, through the Director General of Railroads, duly credited the carrier to the extent of the said two per cent normal tax so paid. The Federal corporation tax upon the net income of railroads, accrued or received in the year 1918, including the normal tax of two per cent, was twelve per cent, and the Federal corporation tax upon the net income of railroads, accrued or received in the year 1919 or succeeding years, was ten per cent.

V

When plaintiff and its subsidiary received $1,570,000 of the just compensation allowed and paid for operations under Federal control, to wit, in the year 1921, the companies were no longer under Federal control and there was no way in which the normal 2 per cent corporation tax, if returned and paid by plaintiff, could be credited to it by the Director General of Railroads. Because of certain deductions allowed by law, the taxable net income of plaintiff and its subsidiary for the year 1921 was $1,064,781.39.

VI

On or about June 13, 1919, consolidated income and excess-profits tax return was made to the collector of internal revenue for the proper district, on behalf of the Pittsburgh & West Virginia
23 Railway Company, plaintiff, and West Side Belt Railroad Company, covering income of said two companies for the year 1918, which report showed a net balance subject to income tax of $20,943.33, and showed the amount of income tax due thereon from the said two companies was $2,513.20, such amount being 12 per cent of the said net balance subject to income tax. At the proper time the said railway companies paid said tax, amounting to $2,513.20, to the internal revenue collector, and thereafter the Director General of Railroads reimbursed the said railway companies for such payment in the amount of one-sixth thereof, or $418.86, such amount representing the 2 per cent normal tax provided for in the revenue act of 1916.

VII

On or about May 10, 1920, consolidated income and excess-profits tax return was made to the internal revenue collector for the proper district, in behalf of the Pittsburgh & West Virginia Railroad Company, plaintiff, and the West Side Belt Railroad Company, covering the income of said companies for the year 1919, showing a net balance subject to income tax of $68,148.57 and showing $6,814.86 due thereon as income tax from said railway companies for said year 1919, said amount being 10 per cent of such net balance subject to such income tax. Said amount of $6,814.86 was thereafter and within the time provided by law paid to said internal revenue collector by the said railway companies, and thereafter said companies were reimbursed for such payment by the Director General of Railroads in the amount of $1,362.97, said sum being one-fifth of said income tax so paid by said companies and being the 2 per cent normal tax on said net balance of income of said companies as provided for in the revenue act of 1916.

VIII

On or about the 14th day of May, 1921, consolidated income and excess-profits tax return was made to the collector of internal revenue of the proper district in behalf of the Pittsburg & West Virginia Railway Company, plaintiff, and the West Side Belt Railroad Company, covering the income of said companies for the year 1920, which showed a net balance of taxable income of the said two companies for said year, subject to income tax of $531,667.22, and showing income tax due thereon from said companies amounting to $53,166.72. Thereafter and in the time provided by law the said railway companies paid said amount of $53,166.72 to the said internal revenue collector, and the plaintiff herein thereafter sought to charge against the Director General of Railroads $5,938.89 of said amount and entered a charge of such amount against the Director General of Railroads in the trustee account of the director general, said trustee account then being in the possession and charge of said plaintiff.

IX

On or about July 6, 1923, the Director General of Railroads, through his accounting representatives entrusted with the duty of auditing said trustee account of said director general so in the
24 possession and charge of said Pittsburgh & West Virginia Railway Company, plaintiff, objected to said act of said Pittsburgh & West Virginia Railway Company in charging to the Director General of Railroads in said account the said amount of $5,938.89 and demanded a correction thereof and demanded that the director general be credited in said account in the amount of $4,160.67, the director general contending that he should have been charged, on account of the payment of said sum of $53,166.72 as income tax levied upon the income of the said railway companies for the year 1920, but $1,772.22, such last-mentioned amount being one-sixth of the 2 per cent normal tax on such income for said year 1920.

X

On or about the 24th day of February, 1920, the Director General of Railroads promulgated his General Order No. 68, authorizing carriers which were under Federal control and operation to establish an account to be known as "trustee account," in which said account the director general should be credited with all funds belonging to the director general in the hands of the carrier at the time, and all assets of the director general that might thereafter come into the possession of the carrier, and in which said account the director general should be charged with all disbursements made by the carrier in behalf of the director general by his express or general instructions, and subject at all times to the provision of said circular and directions of said Director General of Railroads, or his authorized representatives.

XI

In 1923 the income-tax unit of the Bureau of Internal Revenue ruled that plaintiff must pay income tax for the years 1918 and 1919 on a portion of the compensation paid to plaintiff by the director general in July, 1921, for the use of its property during Federal control, said bureau contending that a portion of said compensation should have been accrued as income of plaintiff for each of said years. The plaintiff objected to such ruling and contended that all of the compensation so paid to it in the year 1921 constituted income for said 1921, and plaintiff appealed from such ruling to the committee of appeals and review, which committee, in opinion dated April 2, 1924, approved by the Commissioner of Internal Revenue, upheld such contention of the plaintiff, reversed the ruling of the income-tax unit, and held that the entire amount of such compensation so paid by said director general to said plaintiff in July, 1921, constituted income for the year 1921.

XII

The plaintiff, in adjusting with the Bureau of Internal Revenue, its income tax assessed upon its taxable net income for the year 1921, contended that the compensation received by the plaintiff from the United States Railroad Administration in July, 1921, for the use of its railroad by the Government during Federal control was income for the year 1921, and procured a ruling upholding its said contention and adjusting said plaintiff's income tax for said year on such basis.

25

XIII

Neither the plaintiff nor the West Side Belt Railroad Company received any compensation during either 1918 or 1919 for the use of their properties or either of them by the Government during Federal control, and the income and excess profits tax returns of said companies filed for said years did not include any amount of such compensation, but said returns included only income from other sources.

XIV

Subsequent to the ruling of the Commissioner of Internal Revenue, hereinabove referred to, plaintiff called upon the United States through the Director General of Railroads to reimburse it for the payment of the two per cent tax on the revenues derived from operations during Federal control amounting to the sum of $21,295.62, but the United States has refused to so reimburse the plaintiff or to save it harmless from the payment of said two per cent tax.

XV

The taxes herein claimed were paid under protest, and a claim for refund was duly made to the Commissioner of Internal Revenue, which was denied.

Conclusion of law

Upon the foregoing findings of fact the court decides, as a conclusion of law, that plaintiff is entitled to recover $21,295.62.

It is therefore adjudged and ordered that plaintiff recover of and from the United States the sum of twenty-one thousand two hundred and ninety-five dollars and sixty-two cents ($21,295.62), with interest thereon as allowed by law.

Opinion

BOOTH, Judge, delivered the opinion of the court:

The plaintiff, the Pittsburgh & West Virginia Railway Company, and its subsidiary, the West Side Belt Railroad Co., seek in the petition the recovery of $21,295.62 paid as the 2 per cent normal tax on the consolidated report of its income for the calendar year 1921. One item entering into the net taxable income of the plaintiff was $1,064,781.39 paid to it in accord with a written contract of settlement entered into by the plaintiff and the railroad administration as just compensation for the use of its railroads during the period of Federal control.

The facts, which are not in dispute, are as follows: From January 1, 1918, to February 29, 1920, the whole period of Federal control, the railroads involved were in the possession, control, and operation of the Government. The Federal control act of March 21, 1918, 41 Stat. 451, sec. 1, contained the following provision:

"Any Federal taxes under the act of October 3, 1917, or acts in addition thereto or in amendment thereof, commonly called war taxes, assessed for the period of Federal control beginning
26 January 1, 1918, or any part of such period, shall be paid by the carrier out of its own funds, or shall be charged against or deducted from the just compensation; that other taxes assessed under Federal or any other governmental authority for the period of Federal control or any part thereof, either on the property used under such Federal control or on the right to operate as a carrier, or on the revenues or any part thereof derived from operation * * * shall be paid out of the revenues derived from railway operations while under Federal control * * *."

The act of September 8, 1916, 39 Stat. 756, imposed an income tax of 2 per cent upon the entire net income of every corporation received from all sources. The war coming on, the revenue act increased the tax to 4 per cent by the act of October 3, 1917, 40 Stat. 300, and again by the act of February 24, 1919, 40 Stat. 1057, called

the revenue act of 1918, war taxes of much higher rates were imposed by the following provisions, in section 230, paragraphs (a) and (b):

"That in lieu of the taxes imposed by section 10 of the revenue act of 1916, as amended by the revenue act of 1917, and by section 4 of the revenue act of 1917, there shall be levied, collected, and paid for each taxable year upon the net income of every corporation a tax at the following rates: (1) For the calendar year 1918, 12 per centum of the amount of the net income in excess of the credits provided in section 236; and (2) for each calendar year thereafter, 10 per centum of such excess amount."

"For the purposes of the act approved March 21, 1918, entitled 'an Act to provide for the operation of transportation systems while under Federal control, for the just compensation of their owners, and for other purposes,' five-sixths of the tax imposed by paragraph (1) of subdivision (a) and four-fifths of the tax imposed by paragraph (2) of subdivision (a) shall be treated as levied by an act in amendment of Title I of the revenue act of 1917."

The plaintiff, early in the year 1917, had undergone a reorganization of its corporate affairs, and this fact gave rise to a contention that its operating income for the three years preceding June 30, 1917—the test period established by the statute as a basis for fixing just compensation to the railroads taken over by the Government—did not reflect or furnish a reliable guide for the adjustment of compensation due for the use of its properties. At any rate, during the whole period of Federal control, notwithstanding the report of the Interstate Commerce Commission filed January 16, 1919, disclosing the plaintiff's average annual operating income for the test period above mentioned, the plaintiff and the railroad administration were absolutely unable to agree upon the amount of just compensation due the plaintiff until July 1, 1921. So that as to the entire period of Federal control the plaintiff did not receive from the Government any sum for the use of its properties, except an advancement made by the railroad administration in January of 1920 of $250,000, and upon that sum, as well as other items of independent income, the railroad administration, for the years involved, paid the two per cent normal income tax due from the plaintiff to the Government. The plaintiff, under the terms of the agreement of July 1, 1921, was awarded the sum of $1,800,000 as
27 just compensation. It actually received in cash after the adjustment of prior claims and payments, the sum of $1,570,000. In making its income-tax returns for the year, it was allowed certain deductions, being finally compelled to pay an income tax on $1,064,781.39 as accrued in the year 1921, the Internal Revenue Bureau first holding that the income assessed accrued during the period of Federal control, this ruling being reversed by the committee of appeals and review, holding the same as income for the taxable year 1921.

The defendant, in its contention, does not seek to escape or disavow liability for the payment of the two per cent normal income tax assessed against the plaintiff's income for the taxable years 1918, 1919, and two months of 1920, and as a matter of fact the defendant paid the same. Defense is now made to liability for the tax upon the sole and single basis that there exists no statutory obligation to pay the tax involved upon the income of the plaintiff for the year 1921, a period subsequent to Federal control, when the properties themselves had been returned to the plaintiff and were being operated independently of the railroad administration. The argument is supported almost wholly upon the fact of plaintiff's insistence before the Internal Revenue Bureau that the sum received from the defendant in 1921 was income for the year 1921. We are not primarily concerned with what the Bureau of Internal Revenue did with reference to the time when income accrues for income taxation. The question of liability of the plaintiff for the payment of war taxes is not now before us. Our concern with respect to the present issue is, Who is liable for the payment of the tax, and what correlative rights and liabilities generated from the acts of Congress authorizing the taking over of the railroads in this respect. If the statutes governing the subject imposed upon the Government the legal obligation to pay during the period of Federal control the taxes, other than war taxes, assessed against the plaintiff's income for that period, or assessed upon the revenues or any part thereof derived from operation, it would seem in reason and authority, the liability does not cease because the extent of the obligation was not fixed until after the period of control expired. It is no less a legal obligation though delayed in its discharge.

The just compensation paid to the plaintiff in 1921 was not income earned by the railroads by their independent operation during the year 1921. It was from funds accruing to the Government during its control and operation of the railroads, income from the operation of the plaintiff's railroads earned by the defendant while under the management and operation of the defendant. The defendant would, in accord with its construction of the law, have paid the two per cent normal tax ultimately assessed against this sum if the same, like the $250,000 advanced and deducted therefrom, had been paid during the period of Federal control. The $250,000 advancement was a recognition of liability and obviously an admission that an indeterminate sum was then due the plaintiff, which, under the circumstances, was not then ascertainable, but which would subsequently be fixed and paid. This is exactly what was done.

Section 1 of the Federal control act, heretofore cited, authorized the President to "agree" with and "to guarantee" the railroads making operating returns to the Interstate Commerce Com-
28 sion a sum equivalent, or as near thereto as may be, to its average annual operating income for the three-year test period, as just compensation for the use of its road. The second paragraph of this statute, in language quite too plain to be misunderstood, ex-

presses and assures the railroads another guarantee, a positive assurance that the railroads willing to so agree shall be entitled to receive the sum guaranteed as just compensation undiminished and in nowise depleted by the assessment or payment of any Federal taxes accruing during the period of Federal control, except war taxes. Surely this language can have no other meaning and intent: "Other than taxes assessed under Federal or any other governmental authority for the period of Federal control, or any part thereof, either on the property used under such Federal control, or on the right to operate as a carrier, or on the revenues, or any part thereof, derived from operation * * *."

This was not the single inducement to encourage amicable settlements as to just compensation. On the contrary, the President was empowered to make certain advance payments of the same to the railroads with or without such an agreement. Such was the character of the $250,000 paid to this plaintiff in 1919, and upon which the Government paid the 2 per cent income tax assessed against the same. As a matter of fact the entire statute, from beginning to end, clearly reflects a legislative intent to relieve the railroads from the payment of any Federal taxes, except war taxes, during the time the income from their properties became the property of the Government, and was as to railroads charged with no other burden except the payment of just compensation for the use of the property taken over. The legislation was an indisputable recognition of the constitutional rights of the railroads to receive just compensation, and afforded each of the parties an immediate and complete remedy and opportunity to bring the issue to a permanent end.

Section 10 of the original Federal control act, 40 Stat. 451, declares the absolute ownership of the Government of all the income derived from the operation of the railroads by the Government. Manifestly, the Government was to pay no income tax thereon, and the railroads, of course, in the meantime, received no income from this source, except the payment of just compensation. Having, therefore, lost their properties for the time being, and likewise lost their operating income, the Government assumed the very just obligation of reimbursing the incident loss of making the companies, as near as may be, whole by paying to them a sum ascertainable in the way prescribed, and free and unincumbered by obligations to the payee as to Federal taxes not in their nature war taxes. Congress approved this policy. The act of March 21, 1918, cited above, imposed upon the carriers the payment of any Federal taxes accruing under the act of October 3, 1917, or acts in addition thereto or in amendment thereof, commonly called war taxes, assessed for the period of Federal control beginning January 1, 1918, or any part of such period. Obviously, we need but mention the fact that the original revenue act imposing income taxes was in no sense a war measure. The increase of rates due to war conditions subsequently impressed the legislation with this character, and Congress, by the act of February 24, 1919, 40 Stat. 1057, in section 230, marked out

with precision the line of demarkation between peace and war
29 time rates by providing with reference to the operation of the railroads taken over by the Government that only five-sixths and four-fifths, respectively, of the vast increase in income-tax rates should be treated as levied by an act in amendment of Title I of the revenue act of 1917, a most positive and pronounced recognition of the rights of the railroads with respect to income taxes accruing under the act of October 3, 1918, and the liability of the Government for the payment of all Federal taxes due from the railroads to the Government during the period of Federal control, except as therein mentioned. If the impossibility of recourse to other factors in this case existed, this legislation, we feel certain, is sufficient in itself to confirm beyond peradventure the opinion of the court that the Government beyond question assumed and guaranteed to the railroads operated during Federal control that the compensation to be paid them as just for the use of their properties, would be a sum free and undiminished by governmental tax exactions, other than war taxes.

The defendant seeks to avoid liability by a most insistent assertion that the plaintiff is in effect asserting a contention that an income tax was levied against the railroad administration and the income derived by the Government from the operation of the railroads. Whatever may be the defendant's conception of the plaintiff's argument, the very antithesis of this situation impresses us. Under the statutes defining the rights and liabilities of the parties a mutual right of contract was accorded. Whether the defendant gained or lost by the settlement was, with the exception of the provisions as to the test period as a basis of fixing compensation, a matter of negotiation and contract. When the contract was consummated the sum agreed upon became a governmental liability, a fixed and definite consideration payable to the railroad and obviously income of the railroad. When it became income of the railroad the revenue acts applied and liability for the income tax accrued. Therefore, the only question involved is, under the terms of the law and the contract, which one of the parties assumed the payment of the tax. The statutes of 1918 and 1919 increasing income-tax rates clearly and unmistakably disclose that the two per cent normal income tax herein claimed was not a war tax. The defendant so construed the legislation and acted consistently upon its own construction of the law.

Aside from all that has been said, the defendant in this case entered into a written contract of settlement with the plaintiff. On July 1, 1921, the contract annexed to the petition was executed by the parties. Section 3 of this contract, we repeat here by way of emphasis, provided: "The settlement does not include the obligation of the director general assumed in paragraph (i) and (j) of section 4 of said standard contract to save the company harmless as to claims, if any, of third persons, or the obligations of the director general in respect to the payment of taxes under Section 6 of the contract." Section 6 of the standard form of contract expressly

provided that the railroad was to be saved harmless from the payment of all Federal taxes except war taxes. It even extended the obligation to the payment of expenses by the defendant, in the event of litigation respecting the same. This contract was made under the authority given by sections 202–203 of the transportation act of 1920, a statute extending, and in some respects amplifying, the act of March 21, 1918, an act which accorded the right of contracting for the final adjustment of all claims of the railroads, just compensation included, subsequent to the period of Federal control, a legislative grant of authority to the President to "adjust, settle, liquidate, and wind up all matters, including compensation, and all questions and disputes of whatsoever nature, arising out of or incident to Federal control." The terms of this final agreement indicate an appreciation of the justness of the settlement, an intent of the Government to deal fairly with the railroad. During the whole period of Federal control the income derived from the operation of the railroad was the property of the Government. The plaintiff had no right, title or interest therein. Manifestly, it was not the intent of Congress to impose upon the income thus accruing to the Government an income tax which would be, in effect, but transferring the tax so levied from one pocket to another. Neither would it have been fair and equitable to levy against the railroads the normal peace time income tax assessable against funds paid to the railroad as just compensation, and thus diminish what was their due. Just compensation would not have been awarded by paying in one moment the sum agreed upon as such, and in the next retrieving a substantial portion thereof by way of taxation. The sum paid to this plaintiff as just compensation accrued to it during the period of Federal control; it was a right incident to and growing out of the period of Federal control; it was inseparably annexed to the transaction of governmental operation of the railroad, formed a part of this particular period of time, and related to and was included within the laws respecting the reciprocal rights of the parties incident to the taking over of the railroads. It is a tax assessed against the revenues derived from operation, for that is the source of its accumulation. It may not be divorced from this transaction, although ascertained in amount and paid subsequent to the period of actual accumulation.

The purpose of the transportation act of 1920 was to enable the President to continue after, as he had been empowered previously, the negotiations and contracts for the settlement of liabilities accrued in virtue of the various statutes defining the rights of the parties during the period of Federal control. A task of such magnitude imposed by the law was not capable of complete settlement within the limit of Federal control. The contract thus made follows without deviation the statutes which fixed the rights and liabilities of the parties, and recognizes without equivocation the legal obligation to make the railroad whole as to just compensation, and confirms the practice of the Railroad Administration and what was

done under the laws. The obligations of the railroad respecting taxation during the period of Federal control is what the statutes deal with. This was the subject matter of the contract, and is what was settled by its terms, irrespective of the date. In our opinion, under both the law and the contract, the plaintiff is entitled to recover.

Judgment for plaintiffs in the sum of $21,295.62, with interest thereon as allowed by law. It is so ordered.

Graham, Judge; Hay, Judge, and Downey, Judge, concur.

31 VI. *Judgment*

May 4, 1925

At a Court of Claims held in the city of Washington on the 4th day of May, A. D. 1925, judgment was ordered to be entered as follows:

The court, upon due consideration of the premises, find in favor of the plaintiff, and do order and adjudge that the plaintiff, as aforesaid, is entitled to recover and shall have and recover of and from the United States the sum of twenty-one thousand two hundred and ninety-five dollars and sixty-two cents ($21,295.62), with interest thereon as allowed by law.

BY THE COURT.

VII. *Petition for appeal*

Filed July 17, 1925

From the judgment rendered in the above-entitled cause on the 4th day of May, 1925, in favor of claimant, the defendants, by their Attorney General, on the 17th day of July, 1925, make application for, and give notice of, an appeal to the Supreme Court of the United States.

HERMAN J. GALLOWAY,
Assistant Attorney General.

32 VIII. *Order allowing appeal*

It is ordered by the court this 16th day of November, 1925, that the defendant's application for appeal be and the same is allowed.

IX. *Petition for a cross-appeal*

Filed July 21, 1925

From the judgment rendered in the above-entitled cause on the 4th day of May, 1925, in favor of claimant, the claimant on the 21st day of July, 1925, makes application for, and gives notice of, a cross-appeal to the Supreme Court of the United States.

HARVEY D. JACOB,
Attorney of Record.

X. *Order allowing cross-appeal*

It is ordered by the court this 16th day of November, 1925, that the plaintiff's application for a cross-appeal be and the same is allowed.

33 [Clerk's certificate to foregoing papers omitted in printing.]

34 In Supreme Court of the United States

October term, 1925

THE UNITED STATES, APPELLANT *v.* THE PITTSBURGH & WEST VIRGINIA RAILWAY COMPANY, a Corporation; The West Side Belt Railroad Company, a Corporation.	No. 864

Statement of points to be relied upon and designation by appellant of parts of record to be printed

Filed Jan. 4, 1926

The appellant, United States, intends to rely upon the following points:

(1) That the Court of Claims erred in holding and determining that section 1 of the Federal control act of March 21, 1918 (41 Stat. 451), created an obligation on the part of the United States to pay the 2% normal income tax provided for in the internal revenue act of 1916 (39 Stat. 756), as amended by the internal revenue act of 1917 (40 Stat. 302) and the internal revenue act of 1918 (40 Stat. 1075–1076), levied and assessed on that portion of the incomes of the Pittsburgh & West Virginia Railway Company and its subsidiary, the West Side Belt Railroad Company, for the year 1921, representing compensation paid to said companies by the Director General of Railroads in July 1921, for the use of their railroad
35 properties by the United States during the period of Federal control of railroads, January 1, 1918, to February 29, 1920.

(2) That the Court of Claims erred in holding and determining that by and pursuant to the terms of the final settlement agreements between the Director General of Railroads and the Pittsburgh & West Virginia Railway Company, and its subsidiary, the West Side Belt Railroad Company, dated July 1, 1921, covering the use of the railroad properties of said companies during the period of Federal control of railroads by the United States, the United States became obligated to pay the 2% normal income tax provided for in the internal revenue act of 1916 (39 Stat. 756), as amended by the internal revenue act of 1917 (40 Stat. 302) and the internal revenue act of 1918 (40 Stat. 1075–1076), levied and assessed on that portion of the incomes of the said companies for the year 1921, representing compensation paid to them in the year 1921 by the director general,

pursuant to said final-settlement agreements for the use of their said railroad properties by the United States during said period of Federal control, January 1, 1918, to February 29, 1920.

(3) That the Court of Claims erred in holding and determining that the tax levied and assessed on that portion of the incomes of the Pittsburgh & West Virginia Railway Company and its subsidiary, the West Side Belt Railroad Company, for the year 1921, received from the Director General of Railroads in said year, as compensation for the use of their railroad properties during the period of Federal contol by the United States, was a tax on revenues derived from operation of said railroad properties.

36 (4) That the Court of Claims erred in failing and refusing to dismiss the second amended petition.

(5) That the Court of Claims erred in holding and determining that the United States is liable on the alleged causes of action set out in said second amended petition.

(6) That the Court of Claims erred in entering judgment in favor of plaintiff below.

(7) That the Court of Claims erred in entering judgment against the United States.

It is requested that the entire transcript of record be printed, the entire record being deemed necessary in the presentation of the points relied upon by appellant, the United States.

WILLIAM D. MITCHELL,
Solicitor General.

[File indorsement omitted.]

37 In Supreme Court of the United States

THE PITTSBURGH & WEST VIRGINIA RAILWAY COMPANY, a Corporation; the West Side Belt Railroad Company, a Corporation, appellant *v.* THE UNITED STATES	No. 865

Statement of points to be relied upon and designation by appellants of record to be printed

Filed Jan. 13, 1926

This is to acknowledge receipt by me of the following documents in the above-entitled cases:

(2 copies) Statement of points on which the Pittsburgh & West Virginia Railway Company and the West Side Belt Railroad Company, appellant, intends to rely, and designation of parts of the record to be printed.

Received this 13th day of January, 1926.

WILLIAM D. MITCHELL,
Solicitor General.

38 STATEMENT OF POINTS ON WHICH THE PITTSBURGH & WEST VIRGINIA RAILWAY COMPANY AND THE WEST SIDE BELT RAILROAD COMPANY, APPELLANTS, INTEND TO RELY, AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED

Appellants, the Pittsburgh & West Virginia Railway Company and the West Side Belt Railroad Company, intend to rely upon the following point:

That the Court of Claims erred in refusing to enter judgment in favor of appellants for the reasonable expenses of prosecuting the suit, including attorney's fees.

The amended petition alleged in paragraph 2 of the second count that appellants were entitled under the law and the contract to counsel fees and other expenses in connection with the suit.

Requested finding of Fact VIII asked the court to find that a reasonable sum for such attorney's fees and expenses up to the date of judgment of the court below was $5,000.00, and the
39 requested conclusion of law was that the court should include in its judgment such sum. The court omitted such a finding and failed to include such an amount or any other amount in its judgment, although it was stated in the opinion that the contract "even extended the obligation to the payment of expenses by the defendant in the event of litigation respecting the same (the taxes involved)."

It is requested that the entire transcript of record be printed. The record includes the testimony of only one witness, together with a stipulation of facts. While it is felt that the entire record is not necessary for the proper presentation of the point relied upon by these appellants, it is thought that it is necessary in the presentation of the points relied upon by the United States in its appeal and for a proper reply on behalf of these appellants to the argument to be made by the United States.

HARVEY D. JACOB,
Attorney for Appellants,
the Pittsburgh & West Virginia Railway Company
and the West Side Belt Railroad Company.

[File indorsement omitted.]

[Indorsement on cover:]

File Nos. 31,587, 31,588. Court of Claims. Term No. 864. The United States, appellant, vs. the Pittsburgh & West Virginia Railway Company and the West Side Belt Railroad Company. Term No. 865. The Pittsburgh & West Virginia Railway Company, and the West Side Belt Railroad Company, appellants, vs. The United States. Filed January 4th, 1926. File Nos. 31,587, 31,588.

O

ARGUMENT

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Argument:	
I. THE INCOME TAX FOR 1921 IS NOT A TAX ASSESSED FOR THE PERIOD OF FEDERAL CONTROL, AND IS THEREFORE NOT ONE OF THE TAXES DESCRIBED BY THE FEDERAL CONTROL ACT AND THE STANDARD CONTRACT, MADE PURSUANT TO IT, AS ONE WHICH THE UNITED STATES IS REQUIRED TO BEAR	16
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STATUTES

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In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 864

THE UNITED STATES, APPELLANT

v.

THE PITTSBURGH & WEST VIRGINIA RAILWAY Company and the West Side Belt Railroad Company

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No. 865

THE PITTSBURGH & WEST VIRGINIA RAILWAY Company and the West Side Belt Railroad Company, Appellants

v.

THE UNITED STATES

APPEALS FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 16) is not yet reported.

JURISDICTION

The judgment to be reviewed was entered May 4, 1925. (R. 22.) Application for appeal was filed by the United States July 17, 1925, and by the appellees for cross appeal July 21, 1925. (R. 22.) As no motion for new trial was made, the judgment was "entered" prior to May 13, 1925, the effective date of the Act of February 13, 1925, and the case is properly here on appeal under Sections 242 and 243 of the Judicial Code.

STATEMENT

This suit was brought in the Court of Claims to recover part of the income taxes paid by the appellees on their net income for the year 1921, on the ground that they were entitled to be reimbursed by the United States.

The question presented is whether Federal income taxes for the year 1921 upon the net income of the railway companies for that year are taxes "assessed for the period of" Federal control within the meaning of the Federal Control Act and of the standard form of contract between the Director General and the railroads, because part of the income for the year 1921 consisted of compensation then paid for the use of railroad property by the United States during the period of Federal control.

The fundamental difference between the position of the United States and that of the appellees is obvious.

The United States contends that the period for which the income tax was assessed, and not the source of the income, is the controlling factor in the case. The appellees contend that the source of the income and not the year for which it was assessed is the important consideration.

The appellees are domestic railroad corporations owning and, except during the period of Federal control, operating lines of railroad. The Pittsburgh & West Virginia Railway Company owns all of the stock of the West Side Belt Railroad Company. (R. 11.) They have made consolidated income tax returns.

Their railroad properties were under Federal control from January 1, 1918, until March 1, 1920. (R. 11.)

During Federal control no agreement was made between the Director General and the appellees as to compensation to be made for the use of their properties; but in January, 1920, the Railroad Administration paid to the Pittsburgh & West Virginia Railway Company $250,000 on account of compensation for the use of the properties, and in 1921 a settlement agreement was made fixing the entire compensation at $1,820,000 (R. 12), and the sum of $1,570,000 was paid in 1921 as the balance of the compensation thus determined.

The settlement agreement of 1921 (made under authority of Section 202 of the Transportation Act of 1920, Chap. 91, 41 Stat. 456, 459) provided that the Director General assume towards these

corporations the obligations defined in Section 6 of the standard contract respecting taxes. (R. 6.)

Section 1 of the Federal Control Act (Act of March 21, 1918, Chap. 25, 40 Stat. 451) authorized the President to agree with carriers to pay compensation for the use of their property not exceeding an amount ascertained as provided in the Act, and provided that if such an agreement was made, it should contain, as to taxes, a provision as follows:

> Every such agreement shall provide that any Federal taxes under the Act of October third, nineteen hundred and seventeen, or Acts in addition thereto or in amendment thereof, commonly called war taxes, *assessed for the period of Federal control beginning January first, nineteen hundred and eighteen, or any part of such period,* shall be paid by the carrier out of its own funds, or shall be charged against or deducted from the just compensation; that other taxes assessed under Federal or any other governmental authority *for the period of Federal control or any part thereof,* either on the property used under such Federal control or on the right to operate as a carrier, or on the revenues or any part thereof derived from operation * * * shall be paid out of revenues derived from railway operations while under Federal control; * * *. (Italics ours.)

The standard contract, made pursuant to this statute, and which, by virtue of the settlement agreement, defines the rights of the parties to this case, provides (R. 8):

SECTION 6 (a). All taxes assessed under Federal or any other governmental authority for the period prior to January 1, 1918, including a proportionate part of any such tax assessed after December 31, 1917, for a period which includes any part of 1917 or preceding years, and unpaid on that date, all taxes commonly called war taxes which have been or may be assessed against the company under the act of Congress entitled "An act to provide revenue to defray war expenses and for other purposes," approved October 3, 1917, or under any act in addition thereto or in amendment thereof, and all taxes which have been or may be assessed on property under construction, and all assessments which have been or may be made for public improvements, chargeable under the accounting rules of the Commission in force December 31, 1917, to investment in road and equipment, shall be paid by the company; but upon the amount thus chargeable to investment interest shall be paid to the company during Federal control at the rate provided in paragraph (d) of section 7 hereof. Taxes assessed during construction or additions, betterments, and road extensions made by the company with the approval or by order of the Director General during Federal control, shall be considered a part of the cost of such additions, betterments, and extensions and shall, under the provisions of paragraph (d) of section 7 hereof, bear interest as a part of such cost from the date of the completion of such addi-

tions, betterments, or extensions. Assessments for public improvements which do not become a part of the property taken over shall bear interest from the date of the payment of such assessment.

(c) The Director General shall either pay out of revenues derived from railways operation during the period of Federal control *or shall save the company harmless from all taxes lawfully assessed under Federal or any other governmental authority for any part of said period on the property under such control,* or *on the right to operate as carrier,* or *on the revenues derived from operation, and all other taxes which under the accounting rules of the Commission in force December 31, 1917, are properly chargeable to "railway tax accruals,"* except the taxes and assessments for which provision is made in paragraph (a) of this section. The Director General shall pay or save the company harmless from the expense of all suits respecting the classes of taxes payable by him under this agreement. (R. 8–9.) (Italics ours.)

To ascertain the application of these provisions it is necessary to examine the Revenue Acts.

The Revenue Act approved September 8, 1916 (Chap. 463, 39 Stat. 756, 765), provided in Section 10:

> That there shall be levied, assessed, collected, and paid annually upon the total net income received in the preceding calendar year from all sources by every corporation * * * organized in the United States, no

> matter how created or organized * * * a tax of two per centum upon such income * * *.

The Revenue Act of 1917, approved October 3, 1917 (Chap. 63, 40 Stat. 300, 302), in Title I, provides:

> SEC. 4. That in addition to the tax imposed by subdivision (a) of section ten of such Act of September eighth, nineteen hundred and sixteen, as amended by this Act, there shall be levied, assessed, collected, and paid a like tax of four per centum upon the income received in the calendar year nineteen hundred and seventeen and every calendar year thereafter, by every corporation * * * subject to the tax imposed by that subdivision of that section * * *.

When the Federal Control Act was passed the two tax Acts above set forth were in effect, and the tax which the carriers were expected to bear was the additional four per cent tax prescribed in the Act of 1917 and considered a war tax.

In 1919, after the passage of the Federal Control Act, the Act known as the Revenue Act of 1918 was passed (Chap. 18, 40 Stat. 1057, 1075–1076), which provided:

> SECTION 230 (a). That, in lieu of the taxes imposed by section 10 of the Revenue Act of 1916, as amended by the Revenue Act of 1917, and by section 4 of the Revenue Act of 1917, there shall be levied, collected, and paid for each taxable year upon the net income of every corporation a tax at the following rates:

> (1) For the calendar year 1918, 12 per centum of the amount of the net income in excess of the credits provided in section 236; and
>
> (2) For each calendar year thereafter, 10 per centum of such excess amount.

In order to apply the Federal Control Act it was necessary, under the Revenue Act of 1918, to specify what part of the 12 per centum income tax for 1918 and the 10 per centum income tax for subsequent years should be considered as a war tax imposed by an amendment to the Act of October 3, 1917. Accordingly, in Section 230 (b) of the Revenue Act of 1918 the following provision appears (40 Stat. 1076):

> (b) For the purposes of the Act approved March 21, 1918, entitled "An Act to provide for the operation of transportation systems while under Federal control, for the just compensation of their owners, and for other purposes," five-sixths of the tax imposed by paragraph (1) of subdivision (a) and four-fifths of the tax imposed by paragraph (2) of subdivision (a) shall be treated as levied by an Act in amendment of Title I of the Revenue Act of 1917.

In June, 1919, these corporations made a consolidated income and excess-profits tax return covering their income for the year 1918, showing a net taxable income of $20,943.33, on which the tax, at 12 per cent, was $2,513.20, which the appellees paid, and the Director General thereafter reimbursed the appellees in the sum of $418.86, which was one-

sixth of the tax and the equivalent of 2 per cent of the entire net taxable income of the carriers *from whatever source derived.* (R. 13, Finding VI.)

In May, 1920, appellees made a consolidated return of their incomes for the year 1919, showing a net taxable income from all sources for the year 1919 of $68,148.57, on which the tax, at 10 per cent, the 1919 rate, was $6,814.86, which amount was paid by the appellees to the Collector of Internal Revenue. The Director General thereupon reimbursed the appellees in the sum of $1,362.97, being one-fifth of the total tax and the equivalent of 2 per cent of the net taxable income.

In May, 1921, appellees made a consolidated income tax and excess-profits return covering their incomes for the year 1920, showing a net taxable income for 1920 from all sources of $531,667.22. (The return included in the gross income for the year 1920 the $250,000 paid by the Director General in 1920 on account of compensation.) The tax for 1920 was $53,166.72, which the carrier paid in 1921 to the Collector of Internal Revenue. After some disagreement, the Director General reimbursed the appellees in the sum of $1,772.22. One-fifth of the tax for 1920 (the equivalent of 2 per cent of the net taxable income from all sources) was $10,633.34; but as Federal control ended February 29, 1920, the two months of Federal control in 1920 constituted one-sixth of the year, and one-sixth of $10,633.34 was $1,772.22. (R. 14.)

It will be noted that in all these reimbursements, on account of Federal income taxes for the years 1918 and 1919 and two months of 1920, the Director General reimbursed the appellees for one-sixth or one-fifth, as the case might be, of the income and excess-profits taxes paid by the appellees and assessed for those years *without regard to the sources of the income or whether any part of it was derived from compensation for use by the United States of the railroad properties.*

The sum of $1,570,000, paid to the appellees by the Director General in 1921 in final settlement for compensation, was included by the appellees in their gross income for the year 1921 in making their consolidated return in 1922, covering income for the year 1921. The net taxable income of the appellees for 1921, taking into account their gross income from all sources and *the deductions to which they were entitled in 1921* in computing net income for that year, was $1,064,781.39. The tax at 10 per cent was $106,478.14, which was paid by the appellees to the Collector of Internal Revenue.

The Director General has not reimbursed the appellees for any part of the tax for the year 1921 thus paid. The Court of Claims granted the appellees judgment for $21,295.62, which was one-fifth of the tax on their entire net taxable income for the year 1921, being the equivalent of 2 per cent of their net taxable income. (R. 16.)

In auditing the appellees' return for the years 1918 and 1919, the Bureau of Internal Revenue ruled that of the compensation paid appellees in 1921, and by them treated as income for the year 1921, a part thereof should have been treated as income for the years 1918 and 1919—that is, income for the period of Federal control—with the result of increasing the appellee's income and excess-profits taxes for the years 1918 and 1919. No doubt the theory of the Bureau of Internal Revenue was that the compensation received in 1921 should be considered as accrued during the period of Federal control, when it was earned.

The appellees vigorously resisted this view, insisting that the amount of the compensation, in view of the failure of the Director General and the appellees to agree upon it, could not have been estimated during the period of Federal control and should not be treated as accrued income during that period, and that the compensation paid in 1921 was income for the year 1921 and taxable for that year at the 1921 rate, which was 10 per cent, as against a 12 per cent rate for the year 1918 and 10 per cent rate for the year 1919, and was subject to deductions which the appellees were entitled to take in 1921 as against their 1921 gross income. The appellees appealed the case to the committee of appeals and review, which finally sustained their position and held that the compensation paid in 1921

should be considered as income for that year. (Cumulative Bulletin 1–2, p. 67.)

What the appellees' five-sixths share of the tax for the year 1918, and four-fifths share of the tax for the year 1919 would have been if this compensation, paid in 1921, had been left where the Internal Revenue Bureau tried to place it, as income for the period of Federal control, does not appear.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred in holding that income taxes for the year 1921, assessed under the Revenue Act of 1921 on net income for the year 1921, were taxes assessed "for the period of Federal control," and erred in holding that the United States had agreed to indemnify the appellees against such taxes. So holding, the Court of Claims erred in granting judgment against the United States.

SUMMARY OF ARGUMENT

Such liability as rests upon the United States to reimburse the appellees for taxes paid is founded upon a contract, to be construed in the light of the statutes authorizing it.

I. The contract, authorized and made, obligated the United States to reimburse the appellees for a part of their income taxes assessed for the period of Federal control, without regard to the source of the income taxed, or whether it consisted, in

whole or in part, of compensation paid by the United States for the use of their property.

An income tax assessed for the year 1921, on net income for that year, calculated and imposed under the Revenue Act of 1921, is not a tax assessed for the period of Federal control, and the fact that the gross income for 1921 included some compensation paid by the United States in that year is immaterial.

The provisions of the Revenue Act of 1921 show that Congress acted on the view that the Director General had assumed no obligation to reimburse the carriers for any part of their income taxes assessed for 1921 or later years.

The view that the obligation of the Director General with respect to income taxes of the carriers was determined with reference to the period for which the tax was assessed, and without regard to the source of the income, or whether it included compensation, was confirmed by practical construction in settlements made by the Director General with the appellees with respect to their income taxes for the years 1918, 1919, and 1920.

II. The delay in agreeing upon and paying the compensation to the appellees, and which resulted in a large part of the compensation being treated as income for 1921 and taxed for that year, presents no equitable consideration to justify ignoring the contract provision limiting the liability of the Director General for income taxes to those assessed for the period of Federal control.

The act of the appellees in resisting the attempt of the Commissioner of Internal Revenue to have the compensation paid in 1921 treated as income for the period of Federal control, and in insisting that it be treated as income for 1921, thus giving the appellees the benefit of a lower tax rate and of 1921 deductions, precludes the appellees from claiming they suffered by the delay. This record justifies the inference they have gained by it.

They should not be allowed to deal with one department of the Government on the basis that the compensation was income for the year 1921, and with another on the basis that the compensation paid in 1921 was income for the period of Federal control and subjected to a tax assessed for that period.

III. The cross-appeal is without merit.

ARGUMENT

Such liability as may rest on the United States to reimburse the appellees for any part of the income taxes levied upon and paid by them on their net income for the year 1921 is founded on contract.

The Federal Control Act did not impose such a liability. That Act contemplated that compensation for the use by the United States of the property of the railroads should be determined either by agreement or by judicial award, if the parties failed to agree, made in proceedings instituted in the Court of Claims. The Act did not attempt to define the compensation which should be awarded

in judicial proceedings, nor did it provide that the court in awarding the compensation should require the United States to bear any part of the income taxes which the carriers were required to pay on their net incomes derived from all sources; and if judicial proceedings were resorted to, the courts no doubt would award as compensation the full rental value or value of the use of the properties, leaving the railroad companies, as other taxpayers were required to do, to pay income taxes on such part of the compensation awarded as properly constituted income.

The provisions in the Federal Control Act relating to the payment of taxes are found in Section 1, which authorizes the President to make contracts fixing compensation.

The Act authorized the President to agree with the carriers to pay them as compensation "not exceeding" the amounts ascertained as provided in the Act. (Section 1.) It provided that if such agreement should be made, it should contain certain provisions relative to taxes.

In the present case, no such agreement was made until after Federal control ended, but it was made then in the form of a settlement agreement. That agreement adopted the provisions of the standard contract relating to taxes, so the inquiry here only involves an interpretation of the contract.

As the Federal Control Act supplemented by Section 230 (b) of the Revenue Act of 1918, specified

what such contract, if made, should contain on the subject of taxes, the contract must be treated as conforming to these statutes and construed accordingly, and the terms of the statutes therefore must be considered.

The United States contends (1) that under the terms of its contract with appellees, the income taxes here involved do not come within the definition of those taxes required to be borne by the Railroad Administration, because not assessed for the period of Federal control, and (2) that there are no equitable or other considerations presented which justify disregarding the terms of the statutes and of the contract.

I

THE INCOME TAX FOR 1921 IS NOT A TAX ASSESSED FOR THE PERIOD OF FEDERAL CONTROL, AND IS THEREFORE NOT ONE OF THE TAXES DESCRIBED BY THE FEDERAL CONTROL ACT AND THE STANDARD CONTRACT, MADE PURSUANT TO IT, AS ONE WHICH THE UNITED STATES IS REQUIRED TO BEAR

The Court of Claims failed to concentrate its attention on the language used in the Federal Control Act and in the contract made pursuant to it.

The Act provided (Section 1) that certain taxes "assessed * * * for the period of Federal control" should be borne by the Director General. Federal control ended February 29, 1920. A tax assessed for the year 1921 on the net income of

these corporations for the year 1921 was not a tax assessed "for the period of Federal control" merely because, in calculating the net income for 1921, there was taken into account as gross income for that year certain amounts then paid for the use of the railroads' property during Federal control. The Court of Claims has decided the case as if the statute and contract provided that the United States shall bear the so-called 2 per cent normal tax "on the income derived by the railway company as compensation for the use of its property during Federal control," without regard to the year in which the tax is assessed. The statute does not read that way. The Federal Control Act stated that the contract should provide that the tax to be borne by the United States should be a tax "assessed under Federal authority for the period of Federal control." The expressions used in this statute and the contract made pursuant to it are expressions common in statutes dealing with taxes and have well settled and definite legal significance. The phrases that a tax is assessed for a particular year or that a tax is a tax for a certain year are common terms in the law of taxation.

The income tax assessed for the year 1921 upon the net income of that year, calculated with all the deductions allowable for that year and at the rate specified by law for that year, is in no sense assessed by Federal authority for the period of

Federal control, when Federal control ended in 1920.

The record shows that the United States has already reimbursed these carriers for their one-sixth or one-fifth share of the income taxes assessed by Federal authority for the period of Federal control, without regard to the source of the income.

The decision of the Court of Claims and the contention of the appellees treat the Federal control Act and the contract made pursuant to it as if the phrase " for the period of Federal control " had been omitted.

A quotation from the statute, with this clause bracketed to indicate its omission, shows this to be so.

> That other taxes assessed under Federal or any other governmental authority [for the period of Federal control or any part thereof] either on the property used under such Federal control or on the right to operate as a carrier, or on the revenues or any part thereof derived from operation * * * shall be paid (etc.). (Section 1 of the Federal Control Act.)

The provision of Section 1 immediately preceding that above quoted, and which defined the taxes to be borne by the carriers, used the same expression, " assessed for the period of Federal control," and with the same significance.

A quotation from the standard contract on this subject, bracketing the clause which the Court of

Claims and the appellees ignore and treat as omitted, is as follows:

> The Director General shall either pay out of revenues derived from railway operations during the period of Federal control or shall save the company harmless from all taxes lawfully assessed under Federal or any other governmental authority [for any part of said period] on the property under such control, or on the right to operate as carrier, or on the revenues derived from operation (etc.).

If Congress had intended that the United States should reimburse the railroads for a share of their income taxes without regard to the year in which or for which they were assessed, merely because some items of compensation for the use of the roads, along with other items of gross income, entered into the calculation, it could have done so by omitting the words " assessed for the period of Federal control " and by adding other appropriate provisions on the subject.

The only contract authorized by the statute was a contract which limited the obligation of the United States to reimburse the carriers for a share of the income taxes assessed for the period of Federal control, and the contract actually made limits the obligation of the United States in that way; and neither statute nor contract, by their terms, impose an obligation on the United States to reimburse the railroads for taxes assessed for a later period.

Conclusive confirmation of this view of the statutory contract is found in the tax statutes themselves.

When the Federal Control Act was passed (March 21, 1918), there was one Revenue Act in effect (the Revenue Act of 1916), which imposed a tax of 2 per cent on corporate net income, and another statute (the Act of October 3, 1917), which imposed an additional tax of 4 per cent, enacted on account of the war and commonly known as a war tax.

The Federal Control Act treated the 4 per cent as a war tax, and stated that it and taxes imposed under amendments of the Act of October 3, 1917, should be borne by the carriers.

When the Revenue Act of 1918 (the Act of February 24, 1919) was passed, in lieu of the two taxes separately imposed by the 1916 and 1917 Acts, one of 2 per cent and one of 4 per cent, it substituted one tax of 12 per cent for 1918 and 10 per cent for later years. As a result, it became necessary to state in the Act what part of this tax of 12 per cent or 10 per cent should be considered as the successor of the 4 per cent war tax of 1917 and as a tax imposed by an amendment to the Act of October 3, 1917, so, in Section 230 of the Revenue Act of 1918, it was provided:

> SEC. 230 (a). That, in lieu of the taxes imposed by section 10 of the Revenue Act of 1916, as amended by the Revenue Act of

1917, and by section 4 of the Revenue Act of 1917, there shall be levied, collected, and paid for each taxable year upon the net income of every corporation a tax at the following rates:

(1) For the calendar year 1918, 12 per centum of the amount of the net income in excess of the credits provided in section 236; and

(2) For each calendar thereafter, 10 per centum of such excess amount.

(b) For the purposes of the Act approved March 21, 1918, entitled "An Act to provide for the operation of transportation systems while under Federal control, for the just compensation of their owners, and for other purposes," five-sixths of the tax imposed by paragraph (1) of subdivision (a) and four-fifths of the tax imposed by paragraph (2) of subdivision (a) shall be treated as levied by an Act in amendment of Title I of the Revenue Act of 1917.

This division of one-sixth or five-sixths, or one-fifth or four-fifths, by the terms of Section 230 (b) only applied to taxes "imposed" by paragraphs (1) and (2) of Section 230 (a) of the Act of February 24, 1919, and not to any tax which might be imposed by later statutes.

The Revenue Act of 1921 provided (chap. 136, 42 Stat. 227, 252):

SEC. 230. That, in lieu of the tax imposed by Section 230 of the Revenue Act of 1918, there shall be levied, collected, and paid for each taxable year upon the net income of

every corporation a tax at the following rates:

(a) For the calendar year 1921, 10 per centum of the amount of the net income in excess of the credits provided in section 236; and

(b) For each calendar year thereafter, 12½ per centum of such excess amount.

The income tax of the appellees for the year 1921 was a tax imposed by virtue of the Act of 1921, and the division of one-sixth and five-sixths, or one-fifth and four-fifths, as between the carriers and the United States, effected by Section 230 (b) of the Revenue Act of 1918, being limited to the tax imposed under that statute, did not operate upon the tax imposed by the Revenue Act of 1921. Indeed, the division effected by the 1918 Act was wholly unworkable as applied to taxes under the 1921 Act, for years subsequent to 1921, because the rate specified in the 1921 Act for those years was 12½ per cent, not divisible into one-fifth and four-fifths so as to place 2 per cent on the United States.

The Act of 1921 omitted any such provision as is found in Section 230 of the 1918 Act.

If Congress had considered or understood that an income tax for the year 1921, or later years, was a tax "assessed for the period of Federal control" within the meaning of the Federal Control Act and the standard contract made pursuant to it, merely because the net taxable income for 1921 and later years might have taken into account some compen-

sation derived from the use of the railroad property by the United States, it would, and should, have enacted in the 1921 Act a provision similar to that in Section 230(b) of the 1918 Act, to the effect that the four-fifths of the tax for 1921, imposed by Section 230 of the Act of 1921, should be considered a " war tax " for the purposes of the Federal Control Act, and that, with respect to taxes for later years, where the 12½ per cent rate was made to apply, 10½ per cent of the net income should represent the war tax for the purposes of the Federal Control Act. It failed to make any such provision, showing beyond question that it was not considered that an income tax for 1921, or later years, could, under any circumstances, be considered a tax for the period of Federal control or one any share of which the United States was required to reimburse the railroads for.

There is another consideration which further confirms the view that, with respect to income taxes, the period for which the tax was assessed and not the source of the income taxed was intended to be the test of the Director General's liability to reimburse the carriers.

In the first part of the clause of Section 1 of the Federal Control Act which deals with taxes, it was stated that the carriers should bear the 4 per cent income tax under the Act of October 3, 1917. The inference was, though it was not so stated, that the Director General would bear the income taxes on the carrier's income other than the war income

taxes. The next clause, stating expressly what taxes the Directeor General could agree to pay, seemed to limit his liability not only with respect to the period for which the taxes were assessed, but with respect to the nature of the tax, the provision being that the tax should be one on the property or on the right to operate as a carrier or on revenues derived from operation. This description did not fit an income tax on the carrier's income. The reference to taxes on revenues derived from operation evidently referred to the gross earnings taxes, such as are in force in Minnesota and California, and the carrier could not have any revenues derived from operation during Federal control; and as the Railroad Administration was not subject to an income tax under Federal income tax laws, it could not be subject to a tax on revenues derived from his operation, except gross earnings taxes above referred to.

The idea that the Director General should bear a share of the income tax on the carrier's net income was not clearly expressed. The passage of Section 230 (b) of the Revenue Act of 1918 followed, and this seemed to contemplate the payment by the Director General of a share of the income tax imposed on the carrier's net income under Federal revenue acts, *without regard to the source of the income,* the tax imposed by the Revenue Act of 1918 being a tax on income derived from all sources.

Considering the difficulties presented in attempting to divide an income tax according to the sources

from which the income was derived, and in view of the inferences to be derived from Section 1 of the Federal Control Act and the provisions of Section 230 (b) of the Revenue Act of 1918, all these doubts seem to have been resolved in favor of the carrier and in favor of the view that the law authorized the Director General to agree to pay one-sixth or one-fifth, as the case might be, of the entire income tax assessed for the period of Federal control on the carriers without regard to the source of the gross income entering into the calculation.

In this view of the matter, it resulted that the period for which the tax was assessed, and not the source of the income became the factor which determined the Director General's liability to reimburse the carriers. That principle was applied to the appellees, because the Director General reimbursed them for a share of the income taxes assessed against them for the period of Federal control without regard to the source of the income, and notwithstanding that in 1918 and 1919 no part of their income was derived from compensation paid by the United States for the use of their property. This view was adopted in the standard form of contract, which provided, in Section 6 (c), that the Director General should bear a share of the taxes on the carriers for the period of Federal control, which, under the accounting rules of the Interstate Commerce Commission, were properly chargeable as Railway Tax Accruals. The accounting rules

referred to (issued in 1914, effective July 1, 1914) provide:

> 532. RAILWAY TAX ACCRUALS.—This account shall include accruals for taxes of all kinds (including Federal income tax) relating to railway property (including floating equipment, if any), operations, and privileges, whether based upon the valuation of the property, amount of stocks and bonds issued or outstanding, gross or net earnings, dividends declared, number of passengers carried, quantity of freight transported, length of line operated or owned, rolling stock operated or owned, or other basis.

It was on this agreement relating to "railway tax accruals" which included Federal income taxes that the contract liability of the Director General to pay a share of Federal income taxes is based, and not on the view that the compensation was revenue derived from operation.

The practical construction of the statutes and of the standard contract applied by the Director General to all carriers, and acquiesced in by these appellees, in dealing with income taxes treated the period for which the tax was assessed as the essential factor in determining whether the Director General was required to reimburse the carriers, and ignored completely the source of the income as an element in determining the Director General's liability.

The appellees settled with the Director General on that basis his liability for income taxes for 1918, 1919, and two months of 1920.

The appellees seek now to have the source of the income treated as the test and to ignore the consideration as to whether the tax was one assessed for the period of Federal control.

II

THERE ARE NO EQUITABLE CONSIDERATIONS WHICH JUSTIFY IGNORING THE PLAIN TERMS OF THE CONTRACT

The literal terms of the statutes authorizing the contract and of the standard form of contract made pursuant to them preclude recovery by appellees. There could be no justification for ignoring the provisions of the contract and disregarding the provision that the taxes to be borne by the United States are taxes "assessed for the period of Federal control." The Court of Claims and the appellees, however, insist that because of the delay in paying the compensation, which resulted in its being included in the taxable income for a period after Federal control, there are equitable considerations which should induce the court to hold that the obligation of the United States with respect to a share of the income taxes of the appellees should follow the compensation paid for the use of their property, so that if in any year after Federal control an income tax is assessed on their net income, in the calculation of which income derived from compensation enters, the United States should reimburse them for a share of the tax.

This contention may seem plausible, but analyzed it is manifestly unsound.

In the present case the Commissioner of Internal Revenue first ruled that, although the final determination and the principal payment of compensation occurred in 1921, the amount constituted income to the appellees for the period of Federal control, as this compensation was for the use of their property during Federal control, and should be considered as having accrued in that period, and he, accordingly, allocated this compensation to the years 1918 and 1919, and the first two months of 1920. The rate in 1918 was 12 per cent and in 1919 and in 1920, 10 per cent.

By this adjustment, first made by the Internal Revenue Bureau, although the Director General would have borne part of the tax, the appellees would have paid, as their share of the tax, 10 per cent on part of the income derived as compensation and 8 per cent on the balance, and they would only have been entitled to take as deductions the deductions allowable in the years 1918, 1919, and 1920.

The appellees contested this decision of the Commissioner of Internal Revenue and obtained a decision from the committee of appeals and review, allocating this compensation paid in 1921, as income for that year, and their taxes were adjusted and paid accordingly. The rate for 1921 was 10 per cent. As a result, if the United States bears a share of the tax equal to 2 per cent of their net income for 1921, the railway companies will bear

8 per cent on the net income into the calculation of which the compensation of 1921 entered, instead of 10 per cent on part and 8 per cent on part, as would have been the case if the compensation were allocated to Federal control and subjected to income taxes assessed for the period of Federal control. In other words, by having this compensation allocated to the year 1921, instead of to the years of Federal control, *the appellees have succeeded in having a reduced rate applied in the calculation of that share of the income tax which they admittedly are required to pay.*

This is not all. Being treated as part of the gross income for 1921, the compensation was subject to the deductions in calculating net income allowable in 1921, such as losses, depreciation, interest, and other items suffered and deductible in that year.

The record discloses that deductions amounting to some half million dollars were allowed in arriving at the companies' net income for 1921. What the allowable deductions might have been for the years 1918, 1919, and 1920 do not appear, but the fact that the railway companies vigorously resisted the Government's attempt to have this compensation treated as income accrued during the period of Federal control justifies the inference that the appellees made a large saving in their share of the income tax by having the compensation treated as income for the year 1921. For all that appears in the record, even if the United States is not required to

bear one-fifth of the income tax for the year 1921, the appellees may be much better off than if compensation had been paid during Federal control, treated as income for that period, and subjected to a tax assessed for the period of Federal control, with an admitted obligation on the part of the United States to reimburse the appellees for a portion of it.

In other words, dealing with one department of the Government, the Treasury Department, the appellees, with the result of reducing their tax obligations, have procured a decision that the compensation for the use of their property during Federal control shall not be subjected to a tax assessed for the period of Federal control. Dealing with another department of the Government, the Railroad Administration, the appellees insist that they be treated as if the compensation had been paid during Federal control, and subjected to a tax assessed for the period of Federal control.

This process of whipsawing the Government does not seem to present equities which, in this case, should induce the Court to refrain from a literal application of the terms of the statute.

The delay in determining and paying the compensation has evidently operated to the appellees' advantage.

Appellees have insisted that by statute one-fifth of the tax on their net income was imposed, not on the corporation, but on the Director General, and that the appellees were not lawfully obliged to pay

the tax in the first instance. This is obviously unsound. It has already been shown that such obligation as rests on the United States as respects these taxes is based on a contract to indemnify or hold harmless the appellees.

The Court of Claims found, with respect to taxes under the Revenue Acts of 1916, 1917, and 1918, that—

> It was the custom for each carrier to return and pay the said two per cent normal tax, together with the taxes payable and bearable out of its own funds, upon the receipt of its just compensation, whereupon the United States, through the Director General of Railroads, duly credited the carrier to the extent of the said two per cent normal tax so paid. (R. 12.)

and it appears that this practice was followed in the case of these appellees. (R. 13–14; Findings VI, VII, VIII, and IX.)

The Court of Claims (R. 19) had the notion that the obligation of the United States to pay just compensation included an obligation to exempt that just compensation from Federal income taxes, which would follow the compensation into any year in which it was received and taxed. In this it was in error. The compensation, in so far as it was in the nature of rental for use, was as truly income as would have been the revenue derived by the carriers from operating their own property. Neither the Constitution nor any equitable consideration

required the United States to pay as just compensation the full rental value of the use of the property and at the same time exempt the recipient from such taxes as others were required to pay on their incomes.

The Court of Claims was also in error in saying that the compensation paid the appellees for 1921 was out of income to the Government derived from the operation of the appellees' railroads. There is no finding that the United States derived any net operating revenue from the operation of these railroads. For all that appears in the record, the compensation paid appellees may have come out of the appropriations aggregating $1,750,000,000 made during 1918, 1919, and 1920 for such purposes.

It has already been pointed out that the mention of taxes on revenues from operation had reference to gross earnings taxes levied by States and that the obligation of the Director General, as finally worked out in respect to income taxes paid by the carriers, is determined by the period for which the tax was assessed, and takes no account of the source of the income taxed, so that whether the compensation paid appellees in 1921 was " revenue from operation " is immaterial.

These considerations are not important, but they disclose the loose way in which the case was dealt with below and offer an explanation of the fact that the Court of Claims seems to have failed to

have given consideration to the exact terms of the Federal Control Act and the Revenue Acts and the contracts made under them, and ignored the contract that the income tax to be borne by the Director General was to be a share of taxes assessed for the period of Federal control, on income derived *from all sources,* and not an income tax assessed for some later period on that part of the income derived from compensation.

III

THE CROSS APPEAL IS WITHOUT MERIT

By a cross appeal, appellees question the refusal of the Court of Claims to allow them their attorneys' fees and expenses of prosecuting this suit. (R. 24, 25.)

If the Government is successful on its appeal, that will dispose of the cross appeal, but the claim is without merit in any event.

The prayer in the petition (R. 4) is for " such reasonable sum as the court might in its discretion fix for counsel fees and other expenses in connection with this suit." There is no other allegation on the subject and no finding by the Court of Claims.

The claim for attorney's fees is based on the following language in Section 6(c) of the standard contract (R. 9):

> The Director General shall pay or save the company harmless from the expense of all

suits respecting the classes of taxes payable by him under this agreement.

There were many cases in which the Director General questioned the validity of taxes and required the carrier to litigate the same. The contract was intended to save the carriers harmless from the expense of such litigation. It was never intended as a promise by the United States to pay the carriers attorneys' fees in suits brought against the United States.

It is submitted that the judgment against the United States should be reversed.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.

A. A. MCLAUGHLIN,
General Solicitor, United States Railroad Administration.

FEBRUARY, 1926.

○

In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 864

THE UNITED STATES, APPELLANT

v.

THE PITTSBURGH & WEST VIRGINIA RAILWAY COMPANY and the West Side Belt Railroad Company

---

No. 865

THE PITTSBURGH & WEST VIRGINIA RAILWAY COMPANY and the West Side Belt Railroad Company, Appellants

v.

THE UNITED STATES

APPEALS FROM THE COURT OF CLAIMS

REPLY BRIEF FOR THE UNITED STATES

Two matters dealt with in the brief for the railway companies are commented on in this reply. The first is whether there is justification for our

assertion that the railway companies in this case gained in the matter of taxes by the delay in fixing and paying their compensation, and the second relates to administrative interpretations by the Treasury Department.

I

In the main brief for the United States it was stated (pp. 29–30) that the record justified the inference that the appellees are better off in the matter of taxes by having the compensation treated as income for the year 1921 than they would have been if the compensation had been fixed and paid during Federal control and subjected to income taxes assessed for that period, for part of which they would have been reimbursed by the Director General. The appellees in their brief (pp. 20–21) characterize this as a wild assumption, without any basis.

Further examination of the record discloses that the United States did not go far enough in its main brief, and that there is ample basis in the record for a mathematical demonstration that the appellees have gained in the matter of taxes by delay in the determination and payment of their compensation, even if the United States is not required to pay any part of the income tax for the year 1921. This point was not urged by the United States as a reason for departing from the terms of the contracts and statutes defining its lia-

bility for taxes, but to support the view that there is no reason for avoiding the plain terms of the contract and statute, because of the claim of the appellees, insisted on from the beginning (p. 8) to the end (p. 31) that they are "discriminated against and penalized" as a result of the position taken by the United States in this case.

We will show the result in taxes, if the compensation paid in 1921 had been fixed and paid during Federal control.

The findings of fact show that, after crediting to gross income for the year 1921, the sum of $1,570,000 paid by the United States in that year (R. 13), and after deducting from gross income all the deductions allowable for that year, the net taxable income of these corporations for the year 1921 was $1,064,781.39. This was less than the compensation included in gross income for that year, and if the compensation paid in 1921 is to be treated as earned or paid during the period of Federal control, there would have been no income tax on these corporations for 1921, so taking the compensation from the income for that year results, to start with, in a tax saving to the appellees of $106,478.13, the amount of the 1921 tax.

Turning to the situation disclosed by the findings with respect to the years 1918, 1919, and 1920, we find that in each of those years, whether or not any part of the compensation was included in

gross income, and after allowing all deductions and credits allowable by law for those years, there was a net taxable income for each of those years (R. 13, 14). It follows that if any part of the compensation paid in 1921 is to be included in gross income for any year during the period of Federal control, there will be an increase in the net taxable income of each of these years equal to the amount of the compensation included in the gross income. The only remaining factor in the calculation is to determine to what year or years of the period of Federal control the compensation should be allocated in determining the taxable income of these corporations. There are two methods open, one being to proceed on the theory that the corporation kept its accounts on an accrual basis and to treat the compensation as accrued in each year at the monthly rate ultimately fixed by the settlement agreement. This was the method which the Bureau of Internal Revenue first insisted on. The other available method would be to consider the returns of the appellees as made on a cash receipts and disbursements basis and allocate the compensation to the year in which it would have been paid if the agreement fixing it had been made in advance.

Proceeding first on the accrual basis, the aggregate compensation agreed on was $1,820,000 for the 26 months of Federal control, which is at the rate of $70,000 per month. On the accrual basis,

twelve twenty-sixths of that amount, or $840,000, would be assigned to gross income for 1918, a like amount, $840,000, to 1919, and two twenty-sixths, or $140,000, assigned to the first two months of 1920.

In 1918 the rate was 12%, of which the Director General would have reimbursed the carrier for one-sixth, and the share of the 1918 tax to be borne by the carriers would have been 10% of the net income; and if $840,000 is added to the net taxable income for 1918, the additional tax for that year to be borne by the carrier, after the Director General had paid his share, would have been $84,000.

In the year 1919 the rate was 10%, and the share to be borne by the carrier was 8% of its net income, and if $840,000 be added to the net income for 1919, 8% of that amount would represent an additional tax of $67,200 to be borne by the carrier over and above the share borne by the Director General.

For the year 1920, $250,000 paid in that year as compensation was included. On the accrual basis, only $140,000 should have been included. Consequently, $110,000 too much was included, on the accrual basis, in the 1920 gross income. The 1920 rate was 10%, and the reduction in the carriers' share of the tax by reducing in the sum of $110,000, the net income for that year, would have been 8% thereof, or $8,800. In addition, the carrier would have saved five-sixths of the additional 2%, which

would be $1,833. Tabulating this, the following result is disclosed:

Additional tax for 1918	$84,000.00	
Additional tax for 1919	67,200.00	
		$151,200.00
Total	151,200.00	
Reduction in tax for 1921	106,478.14	
Reduction in tax for 1920	10,633.00	
		117,111.14
Total	117,111.14	
Net gain		34,088.86

The appellees discuss the matter on a cash receipts and disbursements basis, and say that it does not appear what part of the agreed compensation was for the year 1918, the year in which the high rate of 12% was imposed. For the purposes of the calculation, we will yield to these points and treat the $1,570,000 of compensation paid in 1921 as having all been paid in 1919, and no part as having been paid in 1918, the year in which the high rate existed.

As the findings show that after taking all allowable deductions for 1919, these carriers still had a net taxable income (R. 13), the addition of $1,570,000 to the cash receipts for 1919 and to the gross income for 1919 results in an increase in the same amount in the net taxable income for that year. Of the 10% tax for that year, 8% of the net income would represent the share to be borne by the carriers and 8% of $1,570,000 is $125,600, which would have been an increase for the tax in 1919 over and above the share to have been borne by the Director General.

On a receipts and disbursements basis, the $250,000 paid on account in 1920 is left where it is.

While there would have been an increase in the carriers' share of the taxes for 1919, in the sum of $125,600, if the compensation paid in 1921 had been paid in 1919, there would also have been a saving to the carriers of $106,478.14, through a reduction of the 1921 tax, by excluding the compensation from gross income for that year. The difference between these two amounts is $19,121.86.

If, in making the calculation on the accrual basis, all of the compensation be treated as accrued in 1919 and 1920, the low rate years, the saving disclosed would have been the same, to wit, $19,121.86.

It has therefore been demonstrated, from calculations based on facts disclosed by the findings, that if the compensation in this case had been fixed and agreed upon promptly at the beginning of Federal control, and the compensation paid during Federal control, or considered as accrued during Federal control (depending upon the method used by the carrier in its accounting system and as a basis for its returns), and although the Director General being obliged to pay the 2% tax assessed for the period of Federal control would thus have borne a share of the tax on the compensation included in the computations of net taxable income for the period of Federal control, nevertheless on the accrual basis the carrier would have

been worse off to the extent of $34,088.86 in the matter of taxes, and on a cash receipts and disbursements basis worse off to the extent of $19,121.86 in the matter of taxes, than it is as a result of the delay and the payment of part of the compensation in 1921, and with the result that the Director General is not required to pay any share of the income tax for 1921 on the income in which the compensation paid in that year is included. It will be noted that in the calculation on the cash basis, we have resolved every doubt in favor of the appellees and treated the compensation as paid in the year in which the lowest tax rate was applicable.

In the face of these figures, the appellees are hardly justified in characterizing our statements as wild assumptions or in making claims that it has been "discriminated against and penalized to the extent of having its compensation diminished."

On page 19 of the appellees' brief is the statement that, in so far as the record shows, every railroad in the country, except the appellees, received its compensation undiminished by the imposition of the two per cent normal tax.

What does appear in the record contradicts this statement. The record shows that the Director General has in the case of all railroads adhered consistently to the view that the only income taxes of which he is required to pay a share, are those

assessed for the period of Federal control. (R. 12–14.) Any carrier, any part of whose compensation has been paid since Federal control, is in the same position as these appellees. It will hardly do to assume that the compensation of all carriers, except appellees, was fixed and paid during Federal control. The reports of the Director General show that over $100,000,000 of compensation has been paid since Federal control ended. The claim of " discrimination " is a bald assertion, with nothing to support it. This case only involves $21,295.00. If no others were to be ruled by it we would not be troubling this Court with it.

II

The appellees claim that the practical construction by the Treasury Department and the Railroad Administration has been against the contention of the United States.

The practical construction by the Railroad Administration has already been dealt with in the main brief, in which it has been demonstrated that the share of the tax for 1918, 1919, and 1920 to be borne by the Railroad Administration has been adjusted, agreed on and fixed between these carriers and the Director General on the very basis on which the United States now stands—that is to say, on the basis that the Director General was liable for a share of the income tax assessed for the period of Federal control without regard to

the source from which the income was received and without regard to whether compensation was included, thus rejecting the theory that the Director General is to bear a tax assessed for some year not included in Federal control, merely because of the source of the income. The findings also show that the Director General construed the law as imposing the entire tax liability on the carriers, and that his obligation was merely to reimburse them for a share of it.

The administrative interpretation by the Treasury Department on these two points disclosed by the appellees' brief is just the contrary of that asserted by the appellees and exactly consistent with the position of the United States. We are grateful to the appellees for printing in the appendix to their brief (on pp. 33–37) the letter from the Commissioner of Internal Revenue to the appellees' counsel relating to this very case and dated July 14, 1922. That letter shows beyond a doubt that the Commissioner of Internal Revenue took exactly the position here taken by the United States in holding that the liability of the Director General was for a share of the tax for the period of Federal control "on income from all sources, whether or not derived from railway operations." (Page 35, appellees' brief.) The Commissioner also declared, in express terms, that the full tax was imposed upon the carrier by law and that "any payment, therefore, of part of the tax by the

Railroad Administration is in satisfaction of an obligation or liability of the carrier. If the Railroad Administration after the expiration of Federal control, no longer pays part of that obligation imposed upon the railroads by Section 230 (a) of the Revenue Act of 1918, the railroads themselves are necessarily liable." (Pages 36 and 37, appellees' brief.)

The second letter from the Commissioner, dated September 8, 1922, at page 37 of the appellees' brief, merely discloses what we stated in the brief for the United States, that the Bureau of Internal Revenue yielded to the claim of these appellees that the compensation paid in 1921 should not be considered as an accrued earning during the period of Federal control because the amount was then too uncertain to be so considered.

Both the Railroad Administration and the Bureau of Internal Revenue have therefore consistently adhered to the view that the share of the income taxes to be borne by the Railroad Administration was a share of taxes assessed for the period of Federal control without regard to the source of the income and not a tax assessed for some other period than that of Federal control even though compensation was included in the income, and both Departments have consistently adhered to the view that the full tax was by law levied upon the carriers, and that such obligation as the Director General assumed by contract was an obligation to

reimburse the carrier or discharge a part of the carrier's liability to the United States.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.

A. A. MCLAUGHLIN,
General Solicitor, United States Railroad Administration.

MARCH, 1926.

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In the

Supreme Court of the United States

October Term, 1925

No. 364

THE UNITED STATES, *Appellant*

v.

THE PITTSBURGH & WEST VIRGINIA RAILWAY COMPANY AND THE WEST SIDE BELT RAILROAD COMPANY

No. [illegible]

THE PITTSBURGH & [illegible] VIRGINIA RAILWAY COMPANY AND THE WEST SIDE BELT RAILROAD COMPANY, *Appellants*

v.

THE UNITED STATES

APPEALS FROM THE COURT OF CLAIMS

BRIEF FOR APPELLEES AND CROSS-APPELLANTS

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1925

No. 864

THE UNITED STATES, *Appellant*

v.

THE PITTSBURGH & WEST VIRGINIA RAILWAY COMPANY AND THE WEST SIDE BELT RAILROAD COMPANY

No. 865

THE PITTSBURGH & WEST VIRGINIA RAILWAY COMPANY AND THE WEST SIDE BELT RAILROAD COMPANY, *Appellants*

v.

THE UNITED STATES

APPEALS FROM THE COURT OF CLAIMS

BRIEF FOR APPELLEES AND CROSS-APPELLANTS

STATEMENT

This is a suit to recover the two per cent corporation income tax levied by the Revenue Act of 1916, (39 Stats. 756), upon and payable, ordinarily, out of

corporation net income; but, with reference to railroad corporations, and for the period of Federal control, levied upon and payable from "the revenues derived from railway operation." (Section 1 Federal Control Act, 40 Stats. 451).

Appellees and cross-appellants (hereinafter called appellees) are the Pittsburgh & West Virginia Railway Company and the West Side Belt Railroad Company. All of the capital stock of the latter company is owned by the former, and for purposes of taxation the two companies were required to file consolidated tax returns. (R. 11). The railway properties of appellees were taken over by the Government for the period of Federal control of railroads.

Section 10, Par. (a) of the Act of Sept. 8, 1916 (39 Stat. L. 756) provided,—

> "That there shall be levied, assessed, collected, and paid annually upon the total net income received in the preceding calendar year from all sources by every corporation, * * * a tax of two per centum upon such income."

Section 4, par. (a) of the Revenue Act of 1917, approved October 3, 1917 (40 Stats. 300) provided,—

> "That in addition to the tax imposed by subdivision (a) of section ten of such Act of September eighth, nineteen hundred and sixteen, as amended by this Act, there shall be levied, assessed, collected, and paid a like tax of four per centum upon the income received in the calendar year nineteen hundred and seventeen and every calendar year thereafter, by every corporation."

The Act of Sept. 8, 1916, was passed before the United States entered the war and the two per cent

tax thereby imposed is hereinafter referred to as the "normal two per cent tax." Beginning with the war period and by the Revenue Act of 1917, an additional tax of four per cent was imposed, and this additional four per cent tax was known as a "war" tax.

Section 1 of the Act of March 21, 1918, (The Federal Control Act; 40 Stats. 451) among other things, provided,—

> "Any Federal taxes under the Act of October 3, 1917, or Acts in addition thereto or in amendment thereof, commonly called war taxes, assessed for the period of Federal control beginning January 1, 1918, or any part of such period, shall be paid by the carrier out of its own funds, or shall be charged against or deducted from the just compensation;"

and

> "That other taxes assessed under Federal or any other governmental authority for the period of Federal control or any part thereof, either on the property used under such Federal control or on the right to operate as a carrier, or on the revenues or any part thereof derived from operation * * * shall be paid out of the revenues derived from railway operations while under Federal control * * *."

The Federal control Act treats the additional four per cent tax imposed by the Revenue Act of 1917 as a "war" tax.

The Revenue Act of 1918 (40 Stats. 1057), approved on February 24, 1919, after the passage of the Federal Control Act provided in section 230, par. (a),—

> "That, in lieu of the taxes imposed by Section 10 of the Revenue Act of 1916, as amended by the

> Revenue Act of 1917, and by Section 4 of the Revenue Act of 1917, there shall be levied, collected and paid for each taxable year upon the net income of every Corporation a tax at the following rates:
>
> (1) For the calendar year 1918, 12 per centum of the amount of the net income in excess of the credits provided in Section 236; and (2) for each calendar year thereafter, 10 per centum of such excess amount."

Section 230, par. (b) of the same Act provided that,—

> "For the purposes of the Act approved March 21, 1918, entitled 'An Act to provide for the operation of transportation systems while under Federal control, for the just compensation of their owners, and for other purposes,' five-sixths of the tax imposed by paragraph (1) of subdivision (a) and four-fifths of the tax imposed by paragraph (2) of subdivision (a) shall be treated as levied by an act in amendment of Title I of the revenue act of 1917."

Railroad properties were taken over for the period of the war emergency as completely as though by purchase. Under Section 12 of the Act *all revenues derived from operation belonged solely to the Government* and all that was left to the railroad corporations was the provision for just compensation as defined by the Act. Section 1 of the Act provided that for carriers operating normally just compensation should be based upon the average net earnings for the three years immediately preceding Federal control; but that for carriers whose average net earnings (because of re-organizations or other

abnormal conditions) were not fully reflected in the net income, the Director General should enter into negotiation in order to establish such just compensation. Appellees came within the latter class and were forced to negotiate with the Director General to determine just compensation. (R. 11, 12.) The carriers whose just compensation was readily determinable under the Act (and this class constituted practically all of the railroads under Federal control) entered into so-called standard contracts with the Government and received their compensation in installments three or four times a year, while their properties were held by the Government.

The Government concedes that the two per cent normal tax here involved was assumed or paid by it for all railroads thus promptly receiving their just compensation, while Federal control existed, and the Court below so found. (Finding IV, R. 12.) It was the custom, however, for each carrier to return and pay the said two per cent normal tax, together with the taxes payable out of its own funds, whereupon the Government duly credited the carrier for such payment.

All carriers promptly receiving their just compensation during Federal control thus received credit for the two per cent normal tax and the same was borne or paid by the Government. (R. 12.)

The period of Federal control extended from January 1, 1918, to February 29, 1920. (R. 11.) From the beginning to the end of this period, appellees were negotiating with the Director General but no amount of just compensation could be arrived at. The Director General insisted that because of "over-maintenance, betterments and improvements" made by him on appellees' property, that appellees not only were not en-

titled to any compensation whatsoever for the use of the properties, but the Government was entitled to be paid for such over-maintenance, betterments and improvements. Federal control terminated on February 29, 1920, but the controversy between the Director General and appellees continued until *July 1, 1921,* at which time a settlement was effected (R. 5, 9), although in January, 1920, the Director General had made a payment to appellees of $250,000 "on account." (R. 12.)

On July 1, 1921, appellees received, in addition to the $250,000 paid in 1920, the sum of $1,570,000 in full settlement of their just compensation for the use of their properties during Federal control (R. 12), but at that time appellees were no longer under Federal control, and there was no way in which the normal two per cent tax, if returned and paid by appellees, could be credited to them by the Government. (R. 13.) In this situation, appellees applied to the Commissioner of Internal Revenue for a ruling as to the rate of tax to be paid, claiming that it should be credited for the normal two per cent tax payable under the law by the Government. The Commissioner ruled, in his decision of July 14, 1922, that,

> "It was the intention of Congress that this 2% tax which was not regarded as a war tax should be paid by the Railway Administration," and

that the Director General, in the contracts,

> "obligated himself to account for all Federal income taxes for which the railroad companies were not made responsible by specific provision of law in amendment of the Revenue Act of 1917, * * *."

The Commissioner furthermore held, however, that,

> "If the Railroad Administration, after the expiration of Federal control, no longer pays part of that obligation imposed upon the railroads by Section 230 (a) of the Revenue Act of 1918, the railroads themselves are necessarily liable."
>
> (The full text of the ruling is quoted in the appendix to this brief.)

Thereupon appellees paid the full tax under protest.

Under the settlement agreement of July 1, 1921, providing for appellees' just compensation, the Government agreed either to "pay out of revenues derived from railways' operation during the period of Federal control, or save the company harmless" from all taxes, except "war" taxes, assessed under any Federal or other governmental authority for any part of the period of Federal control on the property under such control, *"or on the revenues derived from operation" of the same.* (R. 9.) Subsequent to the ruling by the Commissioner, taxpayer called upon the Director General to reimburse it for the two per cent normal tax, but the Government has refused to reimburse it or to save it harmless from the payment of said two per cent tax. (R. 15.)

Appellees were required to pay, in addition to their "war" taxes, the two per cent normal tax upon income received from operations under Federal control, although they did not receive the "revenues derived from railway operations." The tax was paid under protest, and a claim for refund filed and denied. Suit was then instituted and the Court below gave judgment for the full amount erroneously collected, from which judgment the Government appealed. (R. 16, 22.)

The cross-appeal involves the failure of the Court below to give judgment for the expense of the suit under the provision in the settlement agreement whereby the Director General of Railroads agreed to pay or save appellees harmless from the expense of all suits "respecting the classes of taxes payable by him." (R. 9.)

THE QUESTION INVOLVED

The only question involved is whether Congress intended that the just compensation of all carriers should be computed upon the same basis; or whether because a carrier without its fault is deprived of its just compensation for a period of time extending beyond the duration of Federal Control, the law intended that it should be discriminated against and penalized to the extent of having its compensation diminished by the payment of a tax which the Government uniformly assumed or paid for all carriers *promptly* receiving their just compensation?

SUMMARY OF ARGUMENT

I. THE FEDERAL CONTROL AND REVENUE ACTS IMPOSED UPON THE GOVERNMENT THE OBLIGATION TO ASSUME OR PAY THE NORMAL TWO PER CENT TAX UPON THE JUST COMPENSATION OF RAILROADS UNDER FEDERAL CONTROL.

II. *THE GOVERNMENT'S CONTENTION.*

III. THE DIRECTOR GENERAL OF RAILROADS IN FINAL SETTLEMENT WITH APPELLEES EXPRESSLY AGREED TO PAY THE NORMAL TWO PER CENT TAX.

IV. UNIFORM ADMINISTRATIVE INTERPRETATION BY THE TREASURY DEPARTMENT AND THE RAILROAD ADMINISTRATION IS THAT THE LAW IMPOSED THE NORMAL TWO PER CENT TAX UPON THE GOVERNMENT.

V. THE CROSS-APPEAL. APPELLEES ARE ENTITLED TO RECOVER THE EXPENSE OF THE LITIGATION.

ARGUMENT

I.

THE FEDERAL CONTROL AND REVENUE ACTS IMPOSED UPON THE GOVERNMENT THE OBLIGATION TO ASSUME OR PAY THE NORMAL TWO PER CENT TAX UPON THE JUST COMPENSATION OF RAILROADS UNDER FEDERAL CONTROL.

"In taking over and operating the railroad systems of the country the United States did so in its sovereign capacity as a war measure, 'under a right in the nature of eminent domain.'" (Dupont v. Davis, 264 U. S. 456, 462.)

The Federal Control Act declares the absolute ownership in the Government of all income and revenue derived from the operation of the railroads. (Section 12.) At the time of the passage of this act, the Revenue Act of 1916 had imposed a two per cent normal tax upon such revenue or income and the Revenue Act of 1917 had imposed an additional four per cent "war" tax upon such income.

The taking over of the railroads "under a right in the nature of eminent domain," involved, under the

Constitution, the duty to make "just compensation"; and in an endeavor to meet this constitutional obligation, Congress recognized that prior to the war, railway tax accruals and tax payments had been accounted for and paid from operating revenues, and the normal two percent tax was one of the taxes required under the accounting rules of the Interstate Commerce Commission to be included in the account known as "Railway Tax Accruals." All of the taxes authorized to be paid had been thus deducted from gross operating income during the years preceding Federal control before arriving at net operating income, and if the just compensation was to be on the basis of the net operating income, as provided in the Federal Control Act, it was proper and right for the Government to assume or pay taxes that had theretofore been deducted from gross operating income.

In providing a basis for just compensation, therefore, Congress wisely enacted in section 1 of the Federal Control Act, that every such compensation agreement shall provide that,—

> "Any Federal taxes under the Act of October 3, 1917, or Acts in addition thereto or in amendment thereof, commonly called war taxes, assessed for the period of Federal control beginning January 1, 1918, or any part of such period, shall be paid by the carrier out of its own funds, or shall be charged against or deducted from the just compensation";
>
> and
>
> "That other taxes assessed under Federal or any other governmental authority for the period of Federal control or any part thereof, either on

> the property used under such Federal control or on the right to operate as a carrier, OR ON THE REVENUES OR ANY PART THEREOF DERIVED FROM OPERATION * * * shall be paid out of the revenues derived from railway operations while under Federal control * * *." (Italics ours.)

The language used plainly enacts that the carriers must pay from their just compensation or other funds their share of the war cost,—"war taxes,"—taxes that theretofore had not been deducted from gross operating revenues in arriving at net operating revenues; but that all taxes other than war taxes, whether upon the physical property, the right to operate as a carrier, "or on the revenues derived from operation," the Government should assume or pay out of the revenues received from operation. The only tax here involved is the two per cent normal tax, because that is the only tax these appellees have been unlawfully compelled to pay, the Director General having assumed and paid all other taxes required by the Act.

Should all other argument fail as to the Government's obligation to pay this two per cent normal tax upon appellees' just compensation, there yet remains the undeniable evidence of the Legislative intent found in the use of the words that this normal two per cent tax should "*be paid out of the revenues derived from railway operations while under Federal control.*" The Act had previously declared the absolute ownership of the Government of all revenues derived from operations. If, therefore, the tax was to be paid out of such operating revenues, it necessarily follows that Congress placed the obligation solely upon the Government.

There is no doubt as to the intent of Congress, it is respectfully insisted; but that the view of the legislation above outlined be further confirmed, Committee Reports are quoted:

> "Ordinary taxes, federal and state, are to be paid as heretofore out of operating income. But war taxes are (in effect) payable out of the standard return; the owners of the railroad securities, like the owners of other securities, are thus left to carry their share of the war-tax burden." (House Interstate and Foreign Commerce Committee, reporting Federal Control Act to House on January 9, 1918.)

> "Section 1 further provides that ordinary taxes, national and state, shall, as now, be paid out of operating revenue; but war taxes, accruing under the act of October 3, 1917, are to be paid by the companies out of their own funds, or charged against the standard return." (Senate Committee on Interstate Commerce, reporting Federal Control Act to Senate on February 7, 1918.)

As if to further emphasize the correctness of this contention, Congress, subsequent to the passage of the Federal Control Act and in the Revenue Act of 1918, approved February 24, 1919, provided in section 230 (a), that in lieu of the taxes imposed by section 10 of the Revenue Act of 1916, as amended by the Revenue Act of 1917, there should be levied upon the net income of every corporation a tax of twelve per cent for 1918 and a tax of ten per cent for every year thereafter, *but that,*

> "For the purposes of the act approved March 21, 1918, entitled 'An Act to provide for the opera-

tion of transportation systems while under Federal control, for the just compensation of their owners, and for other purposes,' five-sixths of the tax imposed by paragraph (1) of subdivision (a) and four-fifths of the tax imposed by paragraph (2) of subdivision (a) *shall be treated as levied* by an act in amendment of Title I of the Revenue Act of 1917." (Italics ours.)

The Revenue Act of 1916 *levied* a normal tax of two per cent upon *the total net income* of every corporation.

The Revenue Act of 1917 *levied* an additional "war" tax upon *the total net income* of every corporation.

The Federal Control Act, in an endeavor to arrive at *just compensation* for the use of private property provided that all taxes upon *revenues derived from operation*, other than war taxes, should be paid out of such revenues, and such revenues belonged solely and alone to the Government; and,

The Revenue Act of 1918, while increasing the tax upon *net income* to twelve and ten per cent *levied* only five-sixths and four-fifths, respectively, of such taxes *as war taxes payable by appellees*, inferentially, at least, *levying* the remaining normal tax of two per cent upon the Government or upon operating revenues belonging solely to the Government.

In this situation it would seem unnecessary to urge that no matter when the just compensation, the net income, from its properties was received, appellees were not under the law subject to the normal two per cent tax upon such net income or just compensation received from its properties for the period of Federal control, because, whereas both the Revenue Acts of 1916 and 1917 had *levied* such a tax against appellees' net income, the Federal Control Act and Revenue Act

of 1918 had operated to repeal such levies! The Revenue Act of 1918 in terms *levied* a tax upon appellees *not including the normal two per cent tax but specifically excepting such normal tax from that imposed.*

The power to tax implies the power to destroy, and unless a tax be plainly imposed, it must not by construction or inference be enforced, and while there is no doubt, if doubt arises, it must be resolved as against the intent to tax.

It is submitted that the clear intent of Congress was that the Government should assume and pay the two per cent normal tax upon the net income received from railway operations during Federal control and that in no event should the just compensation to appellees, based upon such net income, be diminished by the imposition or collection of such a tax no matter at what period of time such compensation was received,—whether in 1919 or in 1921.

As was so forcibly stated in the opinion below (R. 19):

> "The entire statute, from beginning to end, clearly reflects a legislative intent to relieve the railroads from the payment of any Federal taxes, except war taxes, during the time the income from their properties became the property of the Government, and was as to railroads charged with no other burden except the payment of just compensation for the use of the property taken over. The legislation was an indisputable recognition of the constitutional rights of the railroads to receive just compensation, and afforded each of the parties an immediate and complete remedy and opportunity to bring the issue to a permanent end."

And, again, (R. 19):

> "If the statutes governing the subject imposed upon the Government the legal obligation to pay during the period of Federal control the taxes, other than war taxes, assessed against the plaintiff's income for that period, or assessed upon the revenues or any part thereof derived from operation, it would seem in reason and authority, the liability does not cease because the extent of the obligation was not fixed until after the period of control expired. It is no less a legal obligation though delayed in its discharge."

It is submitted that the two per cent tax was not *levied* against appellees, and this being so, whether or not it was *levied* against the Government is of no concern. If the normal tax was *not levied* against appellees' just compensation, it was unlawful to compel its payment by appellees.

It will be borne in mind that when Congress enacted the quoted provisions of section 1 of the Federal Control Act it was not dealing primarily with the *subject of taxation.* Taxes entered into the situation as a mere incident. The important question to be legislated upon was the *just compensation* guaranteed by the Constitution for a taking "under a right in the nature of eminent domain." Section 1 *primarily* deals with such just compensation. In providing the basis for such compensation, what it should include, and *how it should not be diminished,* the section requires that every such *compensation agreement* shall provide that all taxes other than war taxes, on the revenues derived from operation shall be paid from such operating revenues which were to belong solely to the Government,—thereby evidencing the clear intent that the

just compensation to the carriers should not be diminished by the normal two per cent or any other tax except the war tax specifically provided for.

The fact that appellees could not enter into the standard form of contract does not place them in a situation as to just compensation different from that of the carriers which made such contracts. Even in cases where negotiations were necessary, as with appellees, the law provided that contracts should be made, and a contract was finally made with appellees on July 1, 1921. The law provided that "every such contract" should contain the provisions as to taxes, and furthermore, the contract finally made with appellees adopted the provisions of the standard contract as to taxes, (Government's brief, bottom p. 15) and appellees became entitled under the law and under the contract to receive its compensation undiminished by the normal two per cent tax, in the same manner as carriers entering into the standard contracts and receiving their compensation regularly and promptly while Federal control continued.

II.

THE GOVERNMENT'S CONTENTIONS

(*a*) *As to the Law.*

The entire argument of the Government centers upon the use of the words, "assessed for the period of Federal control." To properly understand those words, the situation confronting Congress must be weighed. The obligation to pay just compensation was recognized. Congress had provided an adequate and fair method of arriving at such just compensation, both for carriers entering into the standard con-

tract, and those compelled to negotiate. Congress had the right to assume that the administrative branch of the Government would do its duty and carry out the provisions of the Act. It did not for a moment contemplate that Federal control after being in existence for more than two years would terminate before appellees would receive their just compensation! (As to which party was at fault in appellees' failure to receive their just compensation is best illustrated by the fact that appellees *ultimately* received it.) Congress had a right to assume that all carriers would promptly and regularly be paid while Federal control existed, and it was upon this assumption that the words "assessed for the period of Federal control" were used, and must be construed. Even were this not true, the attempted interpretation by Government counsel of the words, is erroneous: In prohibiting the diminution of just compensation, Congress was dealing with several kinds and classes of taxes—some of which were assessed for stated periods, others upon stated things or values. Naturally, with reference to taxes for stated periods, such as yearly licenses, franchise taxes, real estate and personal property taxes, the Government, in fairness, should not be required to assume or pay beyond the actual period of Federal control; but with reference to taxes assessed upon stated things, such as net operating revenues or net income, the intent was clear that if *it accrued or was payable from operations under Federal control*, it did not matter when it was *received*, for the law was plain that the normal tax upon such operating revenue should be paid out of operating receipts, belonging to the Government.

Finally, it is insisted, that the manifest purpose of Congress that just compensation no matter when re-

ceived, should not be burdened with the two per cent normal tax is so apparent when the prime purpose of section 1 is recalled, that to accede to the contention of the Government as to the effect of the words "assessed for the period of Federal control," would defeat the true legislative intent and would tend to penalize appellees because of the Government's failure to promptly provide the just compensation the law intended, and which was ultimately given.

In the Federal Control Act, dealing primarily with just compensation and not taxation, Congress sought to provide compensation fairly and equally to all carriers whose properties were taken over. The Government now concedes that all carriers promptly receiving their just compensation while Federal control existed, practically all of them, likewise received credit for the very tax now imposed upon appellees. To affirm the imposition of such a tax upon appellees, and upon appellees alone so far as is known, is but to say that Congress intended that all other carriers should receive a more complete, a more adequate and just compensation than these appellees! To state such a proposition is to answer it—it is as illogical as it is unreasonable; and, yet, if the Government's construction of the words "assessed for the period of Federal control" be accepted, there is no escape from such a discriminatory result.

(b.) As To Equitable Considerations.

Much is said by Government counsel as to the lack of equitable consideration in appellees behalf.

Appellees have at no time sought equitable relief or urged equitable considerations. Appellees believe

that the law will afford ample relief. The same argument now advanced by the Government that (Brief 13) "the delay in agreeing upon and paying the compensation to the appellees * * * presents no equitable consideration to justify ignoring the contract," was advanced below and the Court ruled that it was irrelevant to the inquiry. (R. 18.) Why such contention is so persistently made is not readily understood, unless there is something akin to guilty conscience involved because of depriving appellees of the use of their just compensation for several years.

If, however, equities should be considered, appellees insist that in equity as well as in law the judgment should be affirmed, because otherwise insofar as the record shows, and insofar as counsel for appellees is informed, every railroad in the country, *except appellees,* will have received the just compensation provided by Congress, *undiminished by the imposition and collection of the two per cent normal tax!*

To hold that such was the intent of Congress would create a situation unparalleled in American legislative history—and, yet, such is the Government's sole contention!

What counsel for the Government is really driving at here, as below, is to hope that by showing a supposed lack of equity in appellees' position, it would necessarily follow that there is much equity in the position of the Government!! Equitable considerations in favor of the Government were not apparent to the Court below. (R. 18.)

Much use is attempted of the fact that appellees in good faith applied to the Commissioner of Internal Revenue for a ruling as to the rate of tax to be paid and the further fact that the Commissioner held that

the payment of $1,570,000 to appellees in 1921 constituted income "received" in 1921, and taxable as such. That the rate of tax in 1921 was ten per cent was a matter beyond the control of appellees. The same ten per cent rate was applicable in 1919 and 1920, although in 1918 the rate was twelve per cent. Confessing, that the compensation finally allowed was compensation for the use of appellees' properties in 1918, 1919 and 1920, and, should have been paid in those years, the Government contends that had such compensation been pro-rated and allocated to the several years, appellees, *perhaps*, would have paid equal, if not higher taxes.

There is nothing, however, in the record to justify such a wild assumption. Indeed, the converse is more probable, because, it will be recalled, the reason the Government declined to compensate appellees in due season was upon the insistence that the "betterments" and "improvements" made by it, overbalanced the thought of compensation. Inasmuch as a great many of these betterments and improvements were made in 1918, the only twelve per cent tax year, it is doubtful that little, if any, compensation would have been paid for such year under any circumstances. Indeed, appellees do not even at this late day know what, if any, compensation was allowed for the year 1918. And this brings us to the truth of the "vigorous contest," so often referred to in the Government's brief: The Railroad Administration failed in its obligation under the law and under its contract to hold appellees harmless from the collection of the normal two per cent tax, and appellees then requested of the Commissioner a ruling as to the rate of tax to be paid. Appellees knew that practically every railroad in the country had been reimbursed for the two per cent tax upon their

just compensation, and they believed that the law afforded them the same right. The Commissioner held that although the law provided that the two per cent tax should be paid by the Railroad Administration, if the Railroad Administration would not assume the obligation thus imposed, *appellees must do so.* The Commissioner furthermore held that the amount of compensation received in 1921 was income for 1918, 1919 and 1920, and the portion attributed to each year must be returned for taxation. Inasmuch as appellees had received the entire sum as a lump sum settlement of just compensation for all three years and had no way of allocating any portion to any one year, their "vigorous protest," consisted of a request of the Commissioner to tell them how to act in accordance with his ruling. The result was that the Commissioner reversed himself and held that although the sum received in settlement was just compensation for 1918, 1919 and 1920, inasmuch as it was received in 1921, it should be returned as income for 1921; and, appellees, *under protest,* so returned it. (The full text of both rulings of the Commissioner is set out in the appendix.)

Whether returning the entire sum in 1921, resulted in a higher or lower tax for appellees is not ascertainable. In the first place, as has been seen, if appellees had been promptly paid during Federal control, it is improbable that they would have received any compensation for 1918, the only twelve per cent year, because of the claim of betterments and improvements; and, then, it is clear that by throwing the entire three years' income into a single year the amount of the tax would be appreciably higher, *since only one year's credits and deductions could be claimed against three years' income.*

III.

THE DIRECTOR GENERAL OF RAILROADS, IN FINAL SETTLEMENT WITH APPELLEES, EXPRESSLY AGREED TO PAY THE NORMAL TWO PER CENT TAX.

The final settlement agreement between appellees and the Director General of Railroads in no way satisfied or cancelled the statutory obligation binding the administrative officers of the Government to relieve appellees of the payment of the two per cent normal tax. Indeed, the final settlement agreement recognized the obligation resting upon the Director General and specifically bound him to indemnify and hold harmless appellees from the imposition and collection of the tax.

Tax returns covering operations of the preceding year are due to be filed in March of each year. When the settlement was made on July 1, 1921, appellees next tax return was due in March, 1922. Appellees did not know what other income would be received for the six remaining months of 1921 or what deductions they might be entitled to. At the time, therefore, settlement was made in July, 1921, the amount of the two percent tax upon the compensation received could not be determined, agreed upon or settled with the Director General, because such compensation was subject to be added to or reduced by the other operations of appellees.

Section 3 of the settlement agreement therefore contained the following provision:

> "3. This settlement does not include the obligation of the Director General assumed in paragraphs (i) and (j) of Section 4 of said standard contract to save the Company harmless as to claims, if any, of third persons, OR THE OBLI-

GATIONS OF THE DIRECTOR GENERAL IN RESPECT TO THE PAYMENT OF TAXES UNDER SECTION 6 OF THE CONTRACT." (R. 6.) (Italics ours.)

Annexed as exhibits to the petition are paragraphs (i) and (j) of Section 4 referred to (R. 7) and particularly Section 6 of the standard contract (R. 8). Paragraph (c) of Section 6, provides that the Director General shall not only save appellees harmless from all taxes lawfully assessed under federal or other governmental authority, except war taxes, but further provides that the Director General shall pay and save appellees harmless from the expense of all suits respecting the classes of taxes payable by him; and paragraph (b) of Section 6 provides that if any taxes properly chargeable to the Director General have been or shall be paid by appellees, they shall be duly reimbursed therefor.

The obligation of the Director General to reimburse appellees for the amount of the taxes they have been compelled to pay and the expense of this suit asking reimbursement for the same is, under Section 6, paragraphs (b) and (c), just referred to, too plain for further comment. Paragraph 3 of the final settlement agreement instead of diminishing or cancelling this liability only reserves and accentuates it. Had there been no liability upon the part of the Director General for the payment of the taxes now in dispute, there would have been no reason to make reservation in the final settlement contract either to indemnify or to reimburse appellees in the event they were compelled to pay the taxes. The settlement agreement was made on *July 1, 1921, more than a year after the termination of Federal control,* and at a time when the Director

General had available every defense to his liability for the normal tax as is now urged. Not having raised such defenses, but instead having reaffirmed and reiterated the Government's liability for the tax, it is now too late to deny the obligation. The position of appellees has materially changed, and the Government is in possession of a full release for appellees' just compensation which it would probably not have had had appellees known that the Director General did not intend to fulfill the obligation imposed by law and contract in favor of these appellees, the same as had been assumed for all other carriers. Had there been any doubt at the time of settlement that the Government intended to continue its practice of assuming and paying the two per cent normal tax, the question of just compensation would have been the subject of further negotiation. Not having raised the questions now at issue at the time the settlement was made and at a time when the same were equally available as now, the Government should not be permitted to urge that neither the law nor the contract obligated it to pay the tax, especially since appellees have changed their position relying upon the settlement contract.

IV

UNIFORM ADMINISTRATIVE INTERPRETATION BY THE TREASURY DEPARTMENT AND THE RAILROAD ADMINISTRATION IS THAT THE LAW IMPOSED THE NORMAL TWO PER CENT TAX UPON THE GOVERNMENT.

That Congress intended that the just compensation for the use of railway properties during Federal control should not be diminished by the two per cent nor-

mal tax has been the uniform construction of the Railroad Administration until its ruling in the case at bar.

The Court below found—

IV

> "Under the Federal control act and internal revenue acts of 1916, 1917, and 1918 all railroads operating under Federal control were required to return and pay out of their own funds and bear all Federal corporation taxes save and except the original normal corporation tax of two per cent. It was the custom for each carrier to return and pay the said two per cent normal tax, together with the taxes payable and bearable out of its own funds, upon the receipt of its just compensation, whereupon the United States, through the Director General of Railroads, duly credited the carrier to the extent of the said two per cent normal tax so paid."

Insofar as the record discloses, and insofar as counsel is informed, the Director General has not diminished the just compensation of any carrier, save appellees, by a failure to pay the two per cent normal tax. The General Solicitor of the Railroad Administration at one time told counsel for appellees that there were other carriers in appellees position, but although this dispute has been pending for four years, counsel for appellees has not been otherwise informed of any similar case.

There seems to be some confusion in the minds of Government's counsel as to whether appellees were duly credited with the two per cent tax upon the payment to appellees in January, 1920, of the $250,000 "on account," counsel for the Government insisting that "as Federal control ended February 29, 1920, the two months of Federal control in 1920 constituted one-

sixth of the year," and that, therefore, appellees were reimbursed for only one-sixth of the two per cent tax. (Brief, bottom p. 9, Citing Record p. 14.)

A reference to the record page 14, Finding IX, does not bear out the Government's contention. What happened was that appellees maintained a "trust account" for the Railroad Administration. When appellees accounted for taxation the $250,000 payment, they immediately credited themselves with the two per cent tax. (Finding VIII.) The Director General, then *demanded* that five-sixths of the credit be restored. (Finding IX.) That is as far as the Court below found the facts. Whether the dispute is still pending is not disclosed by the record, although the Court below in its opinion holds that the Government paid the two per cent tax upon this $250,000 payment (R. 19, lines 15-18), and the Commissioner of Internal Revenue in his decision of July 14, 1922 (Appendix) held that appellees received full credit for the two per cent tax on the $250,000 payment.

The Commissioner of Internal Revenue, in his decision of July 14, 1922 (Appendix), held, that,

> "It was the intention of Congress that this 2% tax which was not regarded as a war tax should be paid by the Railway Administration."

and that the Director General, in the contracts—

> "obligated himself to account for all Federal income taxes for which the railroad companies were not made responsible by specific provision of law in amendment of the Revenue Act of 1917."

These rulings of the Commissioner of Internal Revenue were made in *July, 1922,* more than two years after the termination of Federal control!

As late as December 3, 1923, the Commissioner of

Internal Revenue reaffirmed this settled and consistent administrative construction of the law: In Ruling II-35-1229. S. T. 433, Internal Revenue Cumulative Bulletin II-2, pp. 290, 292, the following language is used:

> "It will be noted that Section 12 of the Federal Control Act, after providing that the money derived from the operation of the carriers during Federal control shall be regarded as property of the United States, makes provision for the disbursement thereof, and further provides that the taxes imposed by Titles I and II of the Revenue Act of 1917 'shall be paid by the carrier out of its own funds.' This language of Section 12 has been accepted by the officers of the United States Railroad Administration as defining the taxes 'commonly called war taxes' referred to in section 1 of the Federal Control Act. Under this construction of the Federal Control Act, the liability of the railroads for taxes under the Revenue Act of 1917 has been limited to those imposed by Titles I and II of that Act, and those taxes imposed under other titles of that Act are payable, if due at all, from money which, under the Federal Control Act, is designated Federal property.
>
> That the construction placed on the Federal Control Act by the officers of the Railroad Administration was adopted by Congress is apparent from the provisions of section 230 (b) of the Revenue Act of 1918. This provision reads as follows:
>
> 'For the purposes of the Act approved March 21, 1918, entitled "An Act to provide for the operation of transportation systems while under Federal control, for the just compensation of their owners, and for other purposes," five-sixths of the tax imposed by paragraph (1) of subdivision (a) and four-fifths of the tax imposed by paragraph (2) of subdivision (a) shall be treated as

levied by an Act in amendment of Title I of the Revenue Act of 1917.' "

It is respectfully submitted that this uniform and consistent administrative construction by two branches of the Government upon every occasion the question has arisen, so far as is known, is entitled to great, if not, controlling, weight.

V.

THE CROSS-APPEAL. APPELLEES ARE ENTITLED TO RECOVER THE EXPENSE OF THIS LITIGATION.

The cross-appeal is from the refusal of the Court below to allow appellees the reasonable expense of prosecuting the suit, including attorneys' fees. (R. 25.)

The Government maintains that there is no allegation upon the subject except in the prayer in the petition. (Brief 33.) Such a statement is wholly inaccurate.

In paragraph 1, second count of the petition (R. 4), the allegation is made that "the United States further agreed to pay or save the plaintiff harmless from the expense of all suits respecting the classes of taxes payable under the agreement."

In paragraph 2, second count (R. 4) the allegation is made that the appellees called upon the Director General of Railroads to reimburse them for the 2% tax paid, "plus such reasonable sum as the Court might, in its discretion, fix for counsel fees and other expenses in connection with this suit."

In paragraph 3, second count (R. 4), the allegation is made that appellees were justly entitled to recover

the amount of the 2% tax paid "plus such reasonable sum as the Court might, in its discretion, fix for counsel fees and other expenses in connection with this suit."

There were only *three* paragraphs in the second count.

Appellees' requested finding of fact VIII in the Court below asked that the Court find that a reasonable sum for such attorneys' fees and expenses up to the date of the judgment below was $5,000.00 and the requested conclusion of law was that the Court should include in its judgment such sum. The Court, however, omitted such a finding and failed to include such an amount or any other amount in its judgment, although it was stated in the opinion that the contract "even extended the obligation to the payment of expenses by the defendant in the event of litigation respecting the same, (the tax involved)." (R. 21.)

The claim for expenses is based upon the following language in Section 6 (c) of the standard contract (R. 9):

> "The Director General shall pay or save the Company harmless from the expense of all suits respecting the classes of taxes payable by him under this agreement."

Obviously, if the tax involved comes within "the classes of taxes" payable by the Director General under the law and under the contract, it needs no argument to demonstrate that this is a suit respecting such taxes.

The Government's sole thought upon the cross appeal is that "there were many cases in which the Director General questioned the validity of taxes and

required the carrier to litigate the same," and that "the contract was intended to save the carriers harmless from the expense of such litigation."

Counsel concedes the correctness of each of these statements, but it is difficult to understand how such statements can make the present controversy any the less a "suit respecting the classes of taxes" payable by the Director General.

"Classes of taxes payable by him" is very broad language, and to concede that one class of tax comes within it in no way implies that another class is excluded. The plural, "classes," does not permit of such construction. Thus it is that if the tax involved is chargeable to the United States, the expense of this litigation necessarily follows.

CONCLUSION

Laws levying taxes must be strictly construed, and,

> "If the words are doubtful, the doubt must be resolved against the Government and in favor of the taxpayer." (United States v. Merriam, 263 U. S. 179, 188, Citing Gould v. Gould, 245 U. S. 151.)

We submit that there is no doubt as to the clear intent of Congress that the just compensation of carriers under Federal control was to come to them undiminished by the normal two per cent tax no matter at what period of time such just compensation might have been received; but that if a doubt arises appellees are entitled to the benefit of the above quoted rule of construction.

We submit that if ever there was doubt, the same

has been removed by consistent administrative interpretation whenever the question has arisen, and that this administrative construction is entitled to great and controlling weight.

We submit that although negotiations were actively engaged in from the beginning of Federal control in January, 1918, and were actively carried on all through 1918, 1919, 1920 and 1921, the Government refused to give appellees their just compensation until July 1, 1921.

We submit that the head upon which the fault must lie for thus depriving appellees of the use of its just compensation for such a length of time is best shown by the fact that ultimately appellees were paid $1,570,000, in addition to the $250,000 "on account" payment.

We submit that the only real or substantial question in the case is—

> Whether Congress intended that the just compensation of all carriers should be computed upon the same basis; or whether because a carrier without its fault is deprived of its just compensation for a period of time extending beyond the duration of Federal control, the law intended that it should be discriminated against and penalized to the extent of having its compensation diminished by the payment of a tax which the Government uniformly assumed or paid for all carriers *promptly* receiving their just compensation?

It is submitted that the judgment against the United States should be affirmed, and that the judgment insofar as it omitted a reasonable allowance for the expense of the suit should be remanded to the Court of

Claims with instructions to ascertain such reasonable expense and to enter judgment therefor.

Respectfully submitted,

HARVEY D. JACOB,
Attorney for Appellees.

FRANK M. SWACKER,
Of Counsel.
February, 1926.

APPENDIX

TREASURY DEPARTMENT

WASHINGTON

Office of
Commissioner of Internal Revenue.

July 14, 1922.

Address Reply to
Commissioner of Internal Revenue
and Refer to

IT:E:RR
FMH

Mr. Harvey D. Jacob,
Woodward Building,
Washington, D. C.

Sir:

Reference is made to your letter of March 13, 1922, making inquiry in behalf of The Pittsburgh and West Virginia Railway Company relative to the rate of tax applicable to an amount received from the Government in 1921 as final settlement of compensation allowed as rental during the period of Federal control.

It is stated that when taken over by the Railway Administration, The Pittsburgh and West Virginia Railway Company was a reorganization of the old Wabash-Pittsburgh Terminal Railway Company, such reorganization having been effected April 1, 1917. Consequently, this company came within that class of carriers whose expenditures for additions, improvements or equipment were not fully reflected in the operating railway income for the three-year period prior to June 30, 1917, and under the Federal Control Act of March 21, 1918, it became necessary for the President, acting through the Railway Administration, to make an agreement with the Pittsburgh and West Virginia Railway Company for just compensation due the railroad while under Federal control. Because of the wide divergency of opinion between the company and the

Director General throughout the negotiations in 1918, 1919 and 1920 as to what the compensation should be, no agreement was reached until 1921, at which time $1,570,000 was paid the company in addition to $250,000 which was paid in January, 1920, on account.

It is stated further that in reporting the amount received on account of compensation in 1920 the company, following the established custom, paid the full rate of corporation income tax under Section 230 of the Revenue Act of 1918 and Section 1 of the Federal Control Act of March 21, 1918, and subsequently was reimbursed by the Director General, in the amount paid representing the 2 per cent tax, which, under the provisions of law above referred to, was required to be paid out of revenues derived from railway operations while under Federal control.

The Federal Control Act of March 21, 1918, contains the following provision:

> "Every such agreement shall provide that any Federal taxes under the Act of October 3, 1917, or Acts in addition thereto or in amendment thereof, commonly called 'war taxes' assessed for the period of Federal control beginning January 1, 1918, or any part of such period, shall be paid by the carrier out of its own funds, or shall be charged against or deducted from the just compensation; that other taxes assessed under Federal or other governmental authority for the period of Federal control or any part thereof, either on the property used under such Federal control or on the right to operate as a carrier, or on the revenues or any part thereof derived from operation * * * shall be paid out of the revenues derived from railway operations while under Federal control. * * *"

At the time of the passage of the Federal Control Act the 2% tax imposed on the net income of corporations under the Revenue Act of 1916 was in effect and it was the intention of Congress that this 2% tax

which was not regarded as a war tax should be paid by the Railway Administration, but that the additional taxes imposed by the Act of October 3, 1917, or Acts in addition thereto or in amendment thereof should be paid by the carriers from their own funds. When the rates of taxation against corporations were increased in the Revenue Act of 1918, the following provision was inserted therein:

> "Section 230 (b). For the purposes of the Act approved March 21, 1918, entitled 'An Act to provide for the operation of transportation systems while under Federal Control, for the just compensation of their owners, and for other purposes,' five-sixth of the tax imposed by paragraph (1) of subdivision (a) and four-fifths of the tax imposed by paragraph (2) of subdivision (a) shall be treated as levied by an Act in amendment of Title I of the Revenue Act of 1917."

In the standard contract made with the various carriers the Director General of Railroads obligated himself to account for all Federal income taxes for which the railroad companies were not made responsible by specific provision of law in amendment of the Revenue Act of 1917, whether such taxes were attributable to revenue from operations or from other income. He was, therefore, accountable for one-sixth of the income tax of railroads under Federal control for 1918, and for one-fifth of such tax for subsequent years on income from all sources, whether or not derived from railway operations. To facilitate the handling of the accounts, the various carriers during the period of Federal control paid the full income tax for each year and were thereupon credited by the Director General with the amount for which he was accountable. This course was pursued in the instant case on the $250,000 payment which was made to the railroad in 1920. It could not be followed, however, when the final payment was made in 1921 as the railroads had been returned to their private owners.

Section 230 (a) of the Revenue Act of 1918 reads as follows:

> "That in lieu of the taxes imposed by Section 10 of the Revenue Act of 1916, as amended by the Revenue Act of 1917, and by Section 4 of the Revenue Act of 1917, there shall be levied, collected and paid for each taxable year upon the net income of every corporation a tax at the following rates:
>
> (1) For the calendar year 1918, 12 per centum of the amount of the net income in excess of the credits provided in Section 236; and
>
> (2) For each calendar year thereafter, 10 per centum of such excess amount."

Inquiry is made as to whether or not the two per cent should be treated as a deduction by the company in reporting the amount received as final settlement of compensation in 1921.

Section 230 (a) of the Revenue Act of 1918, levies a tax of 12 per cent for the year 1918 and 10 per cent for each calendar year thereafter on the net income of every corporation. Railway corporations, while under Federal control, are therefore subject to these rates unless this provision is amended by some other section of the Act. Section 230 (b), the only other section applicable, cannot be construed as amendatory of the levying section. This section merely provides that for the purposes of the Federal Control Act, five-sixths of the tax imposed for the year 1918 and four-fifths for each calendar year thereater shall be treated as levied by an Act in amendment of Title I of the Revenue Act of 1917 and, therefore, payable by the carriers from their own funds. Instead of reducing the rate of taxation of railroads under Federal control, it specifically recognizes the applicability thereto of the rates set forth in the preceding paragraph of the Act and classifies the tax for the purposes of the Federal Control Act which designates the funds from

which the tax is to be paid. Any payment, therefore, of part of the tax by the Railroad Administration is in satisfaction of an obligation or liability of the carrier. If the Railroad Administration after the expiration of Federal control, no longer pays part of that obligation imposed upon the railroads by Section 230 (a) of the Revenue Act of 1918, the railroads themselves are necessarily liable. The Pittsburgh and West Virginia Railroad Company is, therefore, subject to the normal income tax of 12 per cent on that portion of the payment received in 1921 representing compensation for the year 1918 and 10 per cent on the remainder.

Respectfully,
(Signed) D. H. Blair,
Commissioner.

TREASURY DEPARTMENT
WASHINGTON

Office of
Commissioner of Internal Revenue

Address Reply to
Commissioner of Internal Revenue
and Refer to

September 8, 1922.

IT:E:RR
VHW

Mr. Harvey D. Jacob,
Woodward Building,
Washington, D. C.

Sir:

Reference is made to your letter of July 20, 1922, with respect to the rate of tax to be returned by the Pittsburgh and West Virginia Railway Company.

You quote from the letter of this Bureau, dated July 14, 1922, by which you were informed that this Company is subject to normal tax at the rate of 12% on that portion of a payment received in 1921 from the

Railroad Administration which represented compensation for the year 1918 and to normal tax at the rate of 10% on the remainder, and state that this Bureau overlooked certain important facts in making this decision.

The facts said to have been overlooked are: that the Pittsburgh and West Virginia Railway was a company whose earnings for the years previous to the time when it was taken over by the Government could not be accurately determined because of its recent organization, and that it was, therefore, one of the companies coming under Section 3 of the Federal Control Act, which was forced to negotiate with the Railroad Administration in order to establish the amount of the just compensation payable to it while under Federal control, and that it was impossible to determine what, if any, earnings the company realized during the period of Federal control; that while under Federal control the Railway Company negotiated with the Railroad Administration in order to determine the compensation, if any, to which it was entitled; that the company insisted that it had realized net earnings and was entitled to compensation, while the Railroad Administration insisted that there was no net earnings and that consequently the company was not entitled to compensation, and declined to grant any compensation for the years 1918 and 1919; that during 1920 an agreement was reached between the parties whereby the Railway Company was paid $250,000 on account, and that in 1921 the company was awarded further compensation amounting to $1,570,000; and that this latter amount was paid in 1921 and was in full compromise and settlement of all claims for compensation during the period of full control.

You state that there was no way in which the income for the year 1918 could be accrued as at that time and for a long time thereafter the Railroad Company did not and could not know that it would receive any compensation whatever for 1918, and that the insistence of the Railroad Administration that the company was entitled to no compensation whatever made receipt of compensation for 1918 a very remote contingency.

Based upon the foregoing statement of facts you contend that the entire amount of the compromise settlement should be subject to tax at not more than 10%, representing the rate in force at the time it was received, and that no part of such amount should be taxed at the 1918 rate of 12%. This contention is made without waiving your claim that the true rate of tax is 8%.

In reply you are advised that upon a further consideration of this matter in connection with the facts stated in your present letter, the Bureau modifies the last paragraph of its letter to you, dated July 14, 1922, and now holds that the amount received in 1921 by the Pittsburgh and West Virginia Railway Company from the Railroad Administration is income for that year.

Respectfully,

(Signed) D. H. BLAIR,
Commissioner.

SUPREME COURT OF THE UNITED STATES.

Nos. 864 and 865.—October Term, 1925.

864	The United States, Appellant, *vs.* The Pittsburgh & West Virginia Railway Company and the West Side Belt Railroad Company.	Appeals from the Court of Claims.
865	The Pittsburgh & West Virginia Railway Company and the West Side Belt Railroad Company, Appellants, *vs.* The United States.	

[May 24, 1926.]

Mr. Justice Butler delivered the opinion of the Court.

The United States appeals from a judgment in favor of plaintiffs for $21,295.62, being two per cent. tax on their consolidated income for 1921. Plaintiffs have taken a cross appeal, and insist that the court erred in failing to add their expenses and attorneys' fees.

The Pittsburgh Company owned all the capital stock of the West Side Company. Their railroads were taken over by the President and were operated under federal control from January 1, 1918, to March 1, 1920. They failed to make any agreement with the Railroad Administration as to just compensation to be paid them for the use of their properties until final settlement was made July 1, 1921. At that time there was paid to plaintiffs $1,570,000 in addition to $250,000 which had been paid on account in January, 1920. And the Director General assumed, in respect of the payment of taxes, the obligations which are specified in section 6 of the standard form contract authorized by the Federal Control Act, March 21, 1918, § 1, c. 25, 40 Stat. 451.

Plaintiffs made returns and paid the full amount of federal taxes for 1918 and 1919 respectively. These included nothing received

as compensation for the use of their properties. The Director General reimbursed them to the extent of the normal taxes. Plaintiffs made their return and paid their taxes for 1920. Their income in that year included the $250,000 paid on account. As federal control ended March 1, the Director General declined to allow more than one-sixth of the tax. The plaintiffs' taxable net income for 1921 was $1,064,781.39. This, because of deductions allowed, was less than the payment at final settlement. In 1923, upon plaintiffs' insistence, the Bureau of Internal Revenue held that the compensation received in 1921 for the use of their properties during federal control was income for that year, and that none of it was attributable to the period of federal control. Subsequently, plaintiffs called on the Railroad Administration for payment of $21,295.62, two per cent. of their income.

The question for decision is whether plaintiffs' income tax for 1921 was "assessed for the period of Federal control" within the meaning of the Federal Control Act and the authorized standard contract.

Section 1 of the Federal Control Act required that every such agreement should provide that federal taxes under the Revenue Act of 1917, or Acts in addition thereto or in amendment thereof, commonly called war taxes, "assessed for the period of Federal control beginning January first, nineteen hundred and eighteen, or any part of such period" should be paid by the carrier out of its own funds or should be charged against or deducted from the just compensation; that other taxes assessed "for the period of Federal control or any part thereof," should be paid out of revenues derived from operations while under federal control.

The authorized standard form of contract, section 6 (a), provided that all war taxes assessed against the company under the Revenue Act of 1917 or any Act in addition thereto or in amendment thereof should be paid by the company. And paragraph (c) provided that the Director General should either pay out of revenues derived from railway operations "during the period of Federal control" or save the company harmless from all taxes lawfully assessed under federal or other governmental authority "for any part of said period" except the taxes and assessments for which provision was made in paragraph (a).

The tax of two per cent. imposed by § 10 of the Revenue Act of 1916 was known as the normal tax. The additional tax of four

per cent. imposed by § 4 of the Revenue Act of 1917 was a war tax. Section 230 (a) of the Revenue Act of 1918 provided that, in lieu of the two per cent. normal tax and the four per cent. war tax, there should be paid for the calendar year 1918 a tax of 12 per cent. of net incomes and for each year thereafter 10 per cent. Section 230 (b) provided that, for the purpose of the Federal Control Act, five-sixths of the 12 per cent. tax and four-fifths of the 10 per cent. tax should be "treated as levied by an Act in amendment of Title I of the Revenue Act of 1917." Thus, it was plainly indicated that the tax to be borne by the Director General was the two per cent. The amount in controversy is two per cent. of the income tax for 1921. It was assessed under the Revenue Act of that year which provided that, in lieu of taxes imposed by the Act of 1918, there should be paid 10 per cent. of net incomes for 1921 and 12½ per cent. for each year thereafter. The divisions between the Director General and the corporation, prescribed by subdivision (b) of § 230 of the Act of 1918 applied only to taxes imposed by subdivision (a) of that section. No divisions were prescribed by the Act of 1921. Those made by the earlier Act were not intended to apply to taxes imposed by the Act of 1921, and neither of them would produce the two per cent. normal tax if applied to 12½ per cent., the rate for each year after 1921.

The provisions of section 6 of the standard form of contract, the Federal Control Act and the Revenue Acts are to be read together. When this is done, it is clear that the obligation of the Director General to bear the normal income taxes of the corporations did not go beyond those assessed for the period of federal control. That obligation was not held down to the normal tax on amounts received as compensation for the use of their properties, but extended to the normal tax assessed for that period on all incomes taxed without regard to source. But it cannot be held to extend to taxes on incomes for 1921 without excluding from consideration the provisions of the Federal Control Act and standard agreement clearly limiting the obligation to taxes assessed for the period of federal control. The meaning of these provisions is plain. There is no room for construction. The period in which the assessments were made governed. The sources of taxable incomes were not regarded. It would be contrary to the plain language of the statute and contract to hold the United States liable

for any part of the taxes for 1921. Plaintiffs were not entitled to recover.

Their cross appeal depends upon a provision contained in section 6 of the standard contract binding the Director General to pay or save the company harmless from expense of suits respecting the classes of taxes payable by the Director General under the agreement. As the tax was not so payable, plaintiffs take nothing by their cross appeal.

Judgment reversed.

Mr. Justice BRANDEIS took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.